

Supreme Court, U. S.

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JOINT APPENDIX

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-708

STANLEY MARKS, HARRY MOHNEY,
GUY WEIR, AMERICAN AMUSEMENT CO., INC.,
and AMERICAN NEWS CO., INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 13, 1975
CERTIORARI GRANTED MARCH 1, 1976

JOINT APPENDIX

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**ON WRIT OF CERTIORARI TO THE
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A. 2

**DOCKET ENTRIES
(Filed July 26, 1974)**

1. Motion for a Temporary Restraining Order Without Notice 2-26-73.
2. Temporary Restraining Order Without Notice 2-26-73.
3. Copy of Temporary Restraining Order Without Notice with return 2-26-73.
4. Motion to Dismiss 2-28-73.
5. Memorandum of Points and Authorities to Show Cause Why a Search Warrant Should Not Issue for the Seizure of Films 2-28-73.
6. Order: Motion to Dismiss overruled 2-28-73.
7. Order Setting Time and Place of Hearing 3-1-73.
8. Order Setting Time and Place of Hearing with return 3-1-73.
9. Copy of Order Setting Time and Place of Hearing with return 3-1-73.
10. Application for Issuance of a Search Warrant 3-1-73.
11. Affidavit for Search Warrant 3-1-73.
12. Affidavit for Search Warrant 3-1-73.
13. Magistrate's Record of Proceedings 3-1-73.
14. Search Warrant 3-1-73.
15. Notice of Appeal 3-5-73.

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16. Transcript of Hearing Before the Honorable Robert C. Cetrulo 3-21-73.

17. Transcript of Court's Ruling on Defendant's Motion to Dismiss 3-30-73.

18. ORDER of U.S. Court of Appeals for the Sixth Circuit granting motion to dismiss 12-4-73.

UNITED STATES OF AMERICA	74-1531, 74-1532, 74-1533, 74-1534,
EASTERN DISTRICT OF KENTUCKY	74-1535

I, Davis T. McGarvey, Clerk for the Eastern District of Kentucky do hereby certify that the annexed and foregoing relevant documents in the case of The United States of America, plaintiff, versus Stanley Marks, dba Cinema X Theatre, defendant, Magistrate's Docket No. 3, Case No. 192 on the Covington Docket are supplements to the Criminal Case No. 11,057.

IN TESTIMONY WHEREOF, I have herewith subscribed my name and affixed the seal of the aforesaid Court at Covington, Kentucky, this 12th day of July, 1974.

Davis T. McGarvey, Clerk
By: /s/Dorothy D. Walsh, D.C.

A. 4

EXHIBIT NO. 7
(Filed March 1, 1973)

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON**

UNITED STATES OF AMERICA,	:	MAGISTRATE'S DOCKET
PLAINTIFF,	:	NO. 3
VS:	:	
	:	CASE NO. 192
STANLEY MARKS	:	
d/b/a CINEMA X THEATRE,	:	
716 Monmouth Street,	:	ORDER SETTING TIME
Newport, Kentucky	:	AND PLACE OF
DEFENDANT.	:	HEARING

Now to-wit on this 26th day of February, 1973. this matter comes before the undersigned upon the application of the United States of America for the issuance of a search warrant for the premises described as Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky, to search for certain films, previews, containers and documents described in the affidavit attached to said application.

Before a determination is made as to whether or not probable cause is established for the issuing of said search warrant the defendant, Stanley Marks d/b/a Cinema X. Theatre, should be given an opportunity to appear at an adversary hearing at which a determination will be made as to whether or not there is probable cause to find said films obscene.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that said adversary hearing shall be held at the Office of the United States Magistrate at Greenup Street,

A. 5

Covington, Kentucky, on the 27th day of February, 1973,
at 2 P.M., EST.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that said notice of said hearing, which shall be an adversary hearing, shall be served on the defendant by delivering a copy of this Order to the defendant at least twelve hours prior to said hearing.

IT IS FURTHER ORDERED that this Order may be served by any special agent in the Federal Bureau of Investigation.

DATED this 26th day of February, 1973.

/s/ROBERT C. CETRULO
UNITED STATES MAGISTRATE
EASTERN DISTRICT OF
KENTUCKY

A. 6

EXHIBIT NO. 8

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON**

UNITED STATES OF AMERICA,	:	MAGISTRATE'S DOCKET
PLAINTIFF,	:	NO. 3
VS:	:	
	:	CASE NO. 192
STANLEY MARKS	:	
d/b/a CINEMA X THEATRE,	:	
716 Monmouth Street,	:	ORDER SETTING TIME
Newport, Kentucky	:	AND PLACE OF
DEFENDANT.	:	HEARING

Now to-wit on this 26th day of February, 1973. this matter comes before the undersigned upon the application of the United States of America for the issuance of a search warrant for the premises described as Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky, to search for certain films, previews, containers and documents described in the affidavit attached to said application.

Before a determination is made as to whether or not probable cause is established for the issuing of said search warrant the defendant, Stanley Marks d/b/a Cinema X Theatre, should be given an opportunity to appear at an adversary hearing at which a determination will be made as to whether or not there is probable cause to find said films obscene.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that said adversary hearing shall be held at the Office of the United States Magistrate at Greenup Street,

A. 7

Covington, Kentucky, on the 27th day of February, 1973, at 2 P.M., EST.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that said notice of said hearing, which shall be an adversary hearing, shall be served on the defendant by delivering a copy of this Order to the defendant at least twelve hours prior to said hearing.

IT IS FURTHER ORDERED that this Order may be served by any special agent in the Federal Bureau of Investigation.

DATED this 26th day of February, 1973.

/s/ROBERT C. CETRULO
UNITED STATES MAGISTRATE
EASTERN DISTRICT OF
KENTUCKY

RETURN

I received the attached notice of hearing February 26, 1973 and have executed it as follows:

On February 26, 1973 at 1:51 p.m. EST, I served a copy of the said notice on Jay Trimble, Cashier, Cinema X Theater, 716 Monmouth, Newport Kentucky at Cinema X Theater, 716 Monmouth, Newport, Kentucky who was then identified to me as the person in charge.

/s/Vernon R. Glossup
Special Agent, FBI

A. 8

EXHIBIT NO. 9

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON

UNITED STATES OF AMERICA,	:	MAGISTRATE'S DOCKET
PLAINTIFF,	:	NO. 3
VS:	:	
	:	CASE NO. 192
STANLEY MARKS	:	
d/b/a CINEMA X THEATRE,	:	
716 Monmouth Street,	:	ORDER SETTING TIME
Newport, Kentucky	:	AND PLACE OF
DEFENDANT.	:	HEARING

Now to-wit on this 26th day of February, 1973. this matter comes before the undersigned upon the application of the United States of America for the issuance of a search warrant for the premises described as Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky, to search for certain films, previews, containers and documents described in the affidavit attached to said application.

Before a determination is made as to whether or not probable cause is established for the issuing of said search warrant the defendant, Stanley Marks d/b/a Cinema X Theatre, should be given an opportunity to appear at an adversary hearing at which a determination will be made as to whether or not there is probable cause to find said films obscene.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that said adversary hearing shall be held at the Office of the United States Magistrate at Greenup Street,

A. 9

Covington, Kentucky, on the 27th day of February, 1973, at 2 P.M., EST.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that said notice of said hearing, which shall be an adversary hearing, shall be served on the defendant by delivering a copy of this Order to the defendant at least twelve hours prior to said hearing.

IT IS FURTHER ORDERED that this Order may be served by any special agent in the Federal Bureau of Investigation.

DATED this 26th day of February, 1973.

/s/ROBERT C. CETRULO
UNITED STATES MAGISTRATE
EASTERN DISTRICT OF
KENTUCKY

Return

I received the attached notice of Hearing on February 26, 1973 and have executed it as follows:

On February 27, 1973 at 1:20 p.m. EST, I served a copy of the said notice on STANLEY HERMAN MARKS, owner of Cinema X Theater, 716 Monmouth Street, Newport, Kentucky, at 216 East 9th Street, Cincinnati, Ohio in the presence of Attorney Andrew Dennison.

/s/Paul L. Shannon
Special Agent, FBI

/s/Louis Paul Russo
Special Agent, FBI

A. 10

EXHIBIT NO. 10
(Filed March 1, 1973)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

UNITED STATES OF AMERICA	:	MAGISTRATE'S DOCKET
Plaintiff	:	NO. 3
	:	Case NO. 192
vs.	:	
STANLEY MARKS	:	
d/b/a Cinema X Theater	:	APPLICATION FOR
716 Monmouth Street	:	ISSUANCE OF A SEARCH
Newport, Kentucky	:	WARRANT

Comes now the United States of America and moves the Honorable Robert Cetrulo, United States Magistrate for the Eastern District of Kentucky, to issue a search warrant for the premises known as Cinema X Theater, 716 Monmouth Street, Newport, Kentucky and in support of said motion presents the affidavits of Vernon Glossup and Ron Aebly, Special Agents of the Federal Bureau of Investigation, a copy of which is attached to this motion.

Respectfully submitted,

Eugene E. Siler, Jr.
United States Attorney

By: /s/ Louis DeFalaise
Assistant United States Attorney

A. 11

EXHIBIT NO. 11
(Filed March 1, 1973)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
COVINGTON

UNITED STATES OF AMERICA	:	Commissioner's Docket
	:	No. 3
vs.	:	Case No. 192
STANLEY MARKS	:	
d/b/a Cinema X	:	AFFIDAVIT FOR
716 Monmouth Street	:	SEARCH WARRANT
Newport, Kentucky	:	

BEFORE Robert Cetrulo, Covington, Kentucky

The undersigned being duly sworn deposes and says:

That he is positive that on the premises known as

Cinema X Theater
716 Monmouth Street
Newport, Kentucky

Campbell County in the Eastern District of Kentucky there is now being concealed certain property, namely

1. One movie film entitled "Swing High".
2. A preview film clip entitled "Doctors Disciples".

which are obscene, lewd, lascivious and filthy and were knowingly transported in interstate commerce for the purpose of sale and distribution in violation of Title 18, Section 1465, United States Code.

A. 12

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: The affiant has been a Special Agent of the Federal Bureau of Investigation for 2 years.

On the afternoon of Friday, February 23, 1973, the affiant personally entered the premises known as Cinema X Theater, 716 Monmouth Street, Newport, Kentucky paying the admission price of \$5.00. While ther in addition to the film "Deep Throat" and previews listed in the companion affidavit which the affiant has read, there was shown a movie of approximately one hour, entitled "Swing High" and a brief preview entitled "~~Doekers Disciple~~". The affiant observed identical scenes to those described in the affidavit of Special Agent Glossup during the showing of the movie "Deep Throat" as well as various previews listed in Special Agent Glossups affidavit.

The movie "Swing High" opened with a group scene of three naked males and three naked females and one fully dressed female. Two of the naked females were kissing and fondling each other breasts.

The seven participants then decided to pull slips of papers from a cloth has on which would be written various sexual activities to perform. They then performed on the screen with close up of their various sexual organs certain acts of cunnilingus, fellation, sexual intercourse, masturbation, oranism, and sodomy. These acts continued for approximately one half hour at which time they all retired to the bath room and took showers. After showering they switched mates and began performing the same acts again. One male layed on his back and a female in the superior position performed sexual intercourse while another female with dark hair kissed his testicles and rubbed the other female breast.

Two other girls licked the penis of another male like an ice cream cone. The two girls would lick from the bottom to the top of the penis until the male reached his climax interspaced

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their licking by French kissing each other with strands of semen between their mouths.

The girl previously fully dressed performed fellation on another male until he ejaculated in her mouth and semen could be seen in the corners of her mouth.

In another scene a male and female couple performed coitus inter mammary until he ejaculated. The semen sprayed her nose, mouth, and face. She then fellated him.

In another scene the female who had been originally clad lays the top part of her body in a cushioned chair and a male sits on top of the chair and she strokes his penis back and forth with her right hand, while another male kisses and licks her vagina. She then tells the second male to eat her slowly which he did.

In another scene a male and female are having intercourse in the female superior position while he massages her right breast while another female kisses and fondles her other breast.

There are many similar scenes.

The preview of "Doctors Disciples" showed on screen scenes of Onanism, intercourse, and male ejaculation.

The affiant observed some fifty other patrons in the theater.

/s/ Ronald F. Selby
Special Agent, FBI

Sworn to before me, and subscribed in my presence,
26 Feb., 1973

/s/Robert C. Cetrulo,
United States
Commissioner.

A. 14

EXHIBIT NO. 12
(Filed March 1, 1973)

**UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
COVINGTON**

UNITED STATES OF AMERICA	:	Magistrate's Docket
	:	No. 3
vs.	:	
	:	Case No. 192
STANLEY MARKS	:	
dba Cinema X	:	
716 Monmouth Street	:	AFFIDAVIT FOR
Newport, Kentucky	:	SEARCH WARRANT

BEFORE: Robert Cetrulo, Covington, Kentucky

The undersigned being duly sworn deposes and says:

That he is positive that on the premises known as

Cinema X Theater
716 Monmouth Street
Newport, Kentucky

Campbell County in the Eastern District of Kentucky there is now being concealed certain property, namely

1. One movie film entitled "Deep Throat", a Vanguard film directed by Jerry Gerrard, produced by Lou Perry.
2. One movie film entitled "Carnal Cure" produced by Emilo Portici.
3. One set of previews consisting of clips of movie films variously entitled
"Teen Age Cow Girls"
"Black on White"

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"A Few Bucks More"
"Memories of a Madame"
"Let Me Count the Lays"

4. Shipping containers for all the aforesaid films, with markings and labels thereon.
5. Documents pertaining to the source, distribution, and shipping of the aforesaid films and previews.
6. Advertising pertaining to the aforesaid films and previews.

which are obscene, lewd, lascivious, and filthy and were knowingly transported in interstate commerce for the purpose of sale and distribution in violation of Title 18, Section 1465, United States Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

The affiant has been a Special Agent for the Federal Bureau of Investigation for 5½ years. All investigations were personally conducted regarding possible violations of statutes prohibiting interstate transportation of obscene matters, Title 18, United States Code, Section 1462.

1. On the night of Tuesday, February 20, 1973, at approximately 8 P.M., the affiant personally entered the premises known as Cinema X, 716 Monmouth Street, having paid the sum of \$5.00 as the price of admission to a person appearing to be ticket agent for the aforesaid Cinema X theater, 716 Monmouth, the said person being described as follows: White male, 35 to 40 years of age, brown short hair, 5'11", 190 lbs..

This said person stated that the price of admission was \$5.00, accepted the same from me, producing a ticket, tearing it in half, and dropping one-half into a box behind the counter of the front portion of the building. Before proceeding into the theater he then cautioned the affiant that there would be positively no smoking in the theater and no masturbation, using an obscene slang term of 'his last act.

Upon the walls behind the counter in the lobby of the theater in which the aforesaid ticket was purchased, there was a sign stating that the movie being shown advertised in the newspaper as "Deep Voice" was in fact the movie known as "Deep Throat." Subsequent to the said ticket purchase, the affiant passed through one of two red curtains entrances from the lobby end of the theater to the actual theater proper. The affiant there observed as part of the premises known as the Cinema X theater, 716 Monmouth Street, Newport, Kentucky, a viewing room approximately 50' x 150', with a seating capacity of approximately 350 and containing a regular size movie screen, with exits to the left and the right of the screen. Upon entry it was obvious that there was approximately 100 to 125 patrons of both male and female sexes observing the movie which was then in progress.

The affiant then observed in their entirety the following described films which were presented and shown in the said Cinema X theater at 716 Monmouth Street, Newport, Kentucky, described as follows:

1. A film entitled "Deep Throat," prepared by Vanguard Films, written, directed, and edited by Jerry Gerrard, and produced by Lou Perry.

Superimposed upon the screen credits was a well-dressed female actress, walked to enter a 1972 white over blue Cadillac, bearing California license tags, with large white letter titles and credits. In the background were observed palm trees, a large body of water with surf, none of such scenes, to the affiant's knowledge, are located in the Eastern District of Kentucky.

Upon completion of the credits, during which time the featured actress, Linda Lovelace drove the Cadillac through what appeared to be a large California suburban city, she was seen to enter the kitchen of a house in which an older female, approximately 35 years of age, was sitting on a table with her legs spread apart, exposed from the waist down, with a young

male appearing to be a delivery boy engaging her in cunnilingus. During this sequence, the tongue of the male was shown in close-up contact views of the female's labia major, labia minor, clitoris, and vaginal wall. During the act of cunnilingus the female requested the actress, Linda Lovelace, to hand her a cigarette, which she lighted and asked the male, "Do you mind if I smoke while you eat?" The kitchen scene faded to a view of the same older female swimming in a swimming pool. This scene showed the actress Linda Lovelace, who had viewed the earlier cunnilingus with apparent disinterest, seated alongside the pool. A mock serious discussion was then held at the pool-side between the two females concerning Linda Lovelace's disappointment with her many previous sexual experiences. The older female friend then stated that they should have a party with a large number of male guests, of whom at least one should be able to bring Ms. Lovelace to a climax.

The next scene was the arrival at the home of Ms. Lovelace and her older friend of a car containing two young males. The said males then entered the home and were greeted by the older female. They were handed sheets on which were respectively written the numbers 11 and 12, and were told not to worry they were just in time for the party and a good time would be had by all, that they should sit down and have a drink and await their turn.

The next scene was in Ms. Lovelace's bedroom. She was kneeling naked on the bed on her knees and elbows, with a naked male behind her. The camera shifted view to a shot from beneath the groins of Ms. Lovelace and her male companion. Ms. Lovelace's pubic and vaginal area filled the screen, the inside of the vagina being clearly visible due to the lack of pubic hair which had been shaved off. Above the vaginal area, the penis of the male could be observed entering and withdrawing from her rectum in the act of sodomy.

The next scene shifted out to the living room of the house where the older female was also naked and was engaged in sex

with two naked males, one of whom was either sodomizing her or entering her from the rear, and the other on whom she was practicing fellatio. In subsequent scenes, the camera shifted back and forth from the living room with the older female and Ms. Lovelace's bedroom as Ms. Lovelace engaged in a variety of sexual acts with a variety of partners, including cunnilingus on Ms. Lovelace and fellatio by her on her male partner and sexual intercourse, all of which were shown in close-up detail of the contacting human sexual organs. The climax of the fellatio scene was an on-screen ejaculation of semen by a male organ. The final scene of this segment of the film was the living room in which the latest partner of Ms. Lovelace entered and said that she was ready for another male. But no one was left who could perform a sexual act with Ms. Lovelace. It was mentioned that she had just had a total of 14 men.

The next scene presented Ms. Lovelace and her older female friend walking outside. Ms. Lovelace, in summary, stated that she still had not had a full climax as a result of the party that they had held. The older female then suggested that she go see Dr. Young. Ms. Lovelace did so and the next scene was the doctor's office.

The first observation in the doctor scene was a male dressed in medical garb who played a stock "nutty" physician character. The doctor took Linda into an examination room, which appeared to be a bedroom, for a physical examination to determine why she could not reach a climax. The doctor had her remove her underpants and called for his nurse to bring a sterilizer in which the nurse brought a small bowl, in which appeared to be a clear liquid, and into which he dipped his fingers. He then immediately proceeded to examine her vagina, spreading the labia major and labia minor with his fingers, all of which was shown close-up on the screen. The doctor remarked at this point that he could not locate her clitoris and continued his search in the vaginal area for several minutes. Upon learning that she had no clitoris, Ms. Lovelace

began to cry. The doctor then inquired what type of sexual activity gave her the greatest pleasure. She informed him that it was giving head (fellatio). The doctor then asked her to open her mouth so he could examine her oral area. During this examination he discovered that her clitoris was located as he described it, deep in her throat at the base of her throat. He then informed her that to enjoy a normal climax that she must give deep throat. He asked her if she had ever taken a penis deep into her throat, to which she replied no that she choked. He then said it is all a matter of muscle control and discipline, after which he invited her to practice on him. He then opened his pants, exposed himself, and she fellated him. In doing so, on screen she took the head of his organ in her mouth and proceeded to work it entirely into her mouth until the entire organ disappeared from sight. This scene lasted for approximately 10 minutes and was climaxed by her apparent orgasmic experience which was symbolized by mammoth bells ringing, fireworks, and the launching of a Saturn rocket, each scene of which was intertwined with scenes of Ms. Lovelace's mouth, cheeks, and chin, dripping seminal fluid ejaculated from the penis which she licked and swallowed.

Upon the completion of this act, Ms. Lovelace told the doctor that she was in love with him and that they should get married. The doctor declined the marriage proposal, stating his nurse would not let him but he then invited Ms. Lovelace to become his physical therapist.

The following segments of the movie depict case histories of Dr. Young in which Ms. Lovelace, acts as a physical therapist. The opening scene of the first case history showed Dr. Young dictating the case as he performed rear entry intercourse upon his nurse. His voice then faded out and Ms. Lovelace dressed in a white nurse outfit entered a room with a middle-aged male. Ms. Lovelace, while retaining what appeared to be a slip, removed her panties and at the male's invitation, who lowered his pants, climbed upon a table and spread her legs. The male then proceeded to have intercourse with her, which

was shown on screen. During the intercourse he produced a test tube type glass or plastic container and placed this container into her vagina and proceeded to pour coca cola into it, after which they both drank its contents through long plastic tubing as the coca cola theme song played and they continued to have sexual relations.

The next scene showed Ms. Lovelace and the doctor together again, in which she was performing fellatio on him again.

The next scene showed the nurse performing fellation upon Dr. Young as he dictated a case history of an older man who was a widower who had not had sex in the two years since his wife's death. The scene faded to her entering a motel room with a fade back to the doctor who gave the details of this case history and then they faded back to the motel room in which the older male was thanking Ms. Lovelace for her services. The patient said that he would like to continue this type of therapy, to which Ms. Lovelace replied that it would be terribly expensive, and the patient replied that money was no object as he was on Medicare and he produced his Medicare card.

The next scene shows Dr. Young lying in an apparent state of collapse with a hot water bottle to his groin. Ms. Lovelace enters and after repeated refusals by the doctor finally succeeds in uncovering his sexual organs. Over the obvious reluctance of the doctor, she removes a bandage from his penis and proceeds to fellate him.

The next scene shows Dr. Young performing cunnilingus on his nurse who is dictating another case history. The nurse observes that if this patient and Ms. Lovelace were compatible they would be suitable for marriage.

The scene then faded to a bathroom in which Ms. Lovelace was perched upon the water tank of the commode, with one foot in the sink to the right and one foot on the lid of the

commode, with her vaginal area being exposed. She then took an Old Spice shaving mug and lathered her pubic area, as the Old Spice theme played in the background. She then shaved her pubic area and while doing so a masked man with a gun was observed slipping in the front door peering at Ms. Lovelace as she performed her toiletry. Ms. Lovelace upon completing her shaving and wiping off the excess foam then stood up, stretched, and said "I sure could use a big man." She then proceeded to enter the living room where the masked man demanded her money or her life. She handed him her cash and told him to do anything to her but not to hurt her. The masked man then said I am going to rape you, I have a gun. She then said "O.K., just don't hurt me." He then lowered his gun, pulled down his mask, and complained that she wasn't doing it right, that he had a gun and she was supposed to be scared and afraid for her life. She apologized and said it was because he was so masterful but that if he would try it again she would do better. After some further discussion, she urged that they go to bed because he made her hot. She said that she would do anything for him. He then urged her to marry him. She refused and upon his inquiry said, I can't because "the man I marry must have a 9" cock." He began to complain bitterly about his many failures in life but that he understood and that he was only 4" from happiness. Ms. Lovelace then urged him to call Dr. Young to see if a silicone injection or some other surgical procedure would help. The male was observed calling on the telephone and apparently having a conversation with Dr. Young. At the end of the conversation the male hung up and said that Dr. Young would help him, that he could cut it down and make it any size she wanted. He then exposed himself. She then eagerly seized his organ and performed fellatio which was again climaxed with the mammoth bells ringing, fireworks, and launching of a Saturn rocket and each scene of which was intertwined with scenes of her mouth, cheeks and chin smeared, seminal fluid seen ejaculating from the penis, and also the licking and swallowing of this fluid.

This feature ended.

2. A movie entitled "Carnal Cure", produced Emilo Portici. The first scene in this movie was what appeared to be a doctor's office. The doctor entered and went into his office. A young lady then entered and asked to see the doctor. The nurse sent her into the inner office. The girl complained to the doctor that she had a cuckoo which came out of her periodically. The doctor inquired from whence the cuckoo came. She replied by indicating her vagina. The doctor had her remove her pants, hike her skirts, and sit upon his desk for the examination. A close-up of the exposed sex organ was then shown as the doctor used his fingers to spread the labia major and minor, and touch the inner vaginal tract, including her clitoris. During this examination, the doctor and the young lady carried on a conversation about the periodic appearance of the alleged cuckoo. The doctor stated that he could not find any evidence of a foreign body, but stated that perhaps he could stimulate it out. Then on screen in close ups he proceeded to perform cunnilingus, applying his lips and tongue to the whole vagina area, but particularly the clitoris and labia majors and minors. This treatment produced no results except what appeared to be an orgasmic experience by the female. The doctor then had the girl lie back on the desk after she divested herself of her clothing and then producing his erect organ proceeded to have intercourse with her in which there were many close ups of the vagina being entered by the penis.

During these acts performed by the doctor there were fade-outs to the outer office during which three separate males entered the office and upon demanding to see the doctor were taken by three different nurses to examining rooms where the nurses proceeded to remove their clothing and directed the males to do the same. In succeeding scenes there were frequent cuts back and forth to the doctor's office in which the events previously described were being transacted to the three examining rooms.

In the first examining room, the first female nurse, white, apparent age early 20's with shoulder length curly brown hair,

was now nude. With her was a tall white male appearing to be in late adolescence, also nude. During the many cuts back and forth to this couple, the male performed cunnilingus on the female. The female performed fellatio on the screen, climaxed by closeup shots of the male organ in the female mouth with his seminal fluid pouring fourth over her chin. Subsequently, this same couple performed various acts of copulation in various positions on screen, interspaced with the scenes previously described where shots of the second nurse and her male companion who were in another examining room.

The second nurse, white female, with shoulder length black hair, was totally nude. This female appeared to be in her early to mid 20's with large breasts. Her male companion also nude, appeared to be medium height with black hair. This couple also performed various on screen acts of fellation, cunnilingus and coitus in various positions climaxed by an act of reciprocal oral intercourse, with the female above in the "69" position. All of the above scenes were interspersed with scenes of the 4th couple.

The fourth nurse was an athletic looking, long-haired blonde, apparently in her 20's. She was also nude. Her male companion appeared to be in his late 20's with short, dark, curly hair. They also performed on screen acts of fellatio, cunnilingus and coitus, particularly showing shots of intercourse in the female superior position with closeups of her vagina as it rose and fell on the penal shaft.

In the final scenes of the movie, the young female patient had left as had the male patient with the first nurse who paid her \$20.00. That nurse then went to the doctor's office where he requested that she submit to a vaginal examination and upon her exposing herself, he declared, "You still have the prettiest pussy in the world." He then performed cunnilingus upon her, after which he invited her to have lunch on his penis, which she did. They then engaged in sexual intercourse on screen.

In the final scenes of the movie, the first nurse then goes into the examining room where the third nurse is now engaged in reciprocal oral intercourse in the female superior "69" position. She tells the third nurse that the doctor wants her, and that she will take over. The third nurse removes the male's penis from her mouth and, getting up, leaves. The first nurse then assumes her position, her pubic area in immediate proximity to the male's mouth and takes his penis into her mouth. All of which is shown on screen.

At the end of the movie, the girls are counting up the money they have received for their various services. This movie closes as the third male patient returns to see the doctor, upon seeing him and receiving a conventional treatment for which he was charged \$5.00 told the doctor he preferred the \$20.00 treatment.

3. Several previews shown as coming attractions, not necessarily in this order:

First: A preview entitled "Teen-age Cowgirls." During this preview, two adolescent females, one black, one white, are shown in closeup scenes of fellatio and copulation, all of which are shown on screen. During these scenes, a narrator's voice was heard urging patrons to attend this future feature in which they would be shown explicit sex at its wildest in the west.

Second: A preview for a movie as a coming attraction at the Cinema X theater, 716 Monmouth Street, Newport, Kentucky, was shown entitled, "Black on White." During this preview, on screen were shown various acts of fellatio cunnilingus and coitus by a white male and black female and a black male and white female. During these scenes, a narrator's voice was heard stating that this was a future offering of this theater and asking whether you, as a white male had ever wondered about sex with a black female, using slang expressions to describe her anatomy. The voice then asked whether

you, as a white female had ever wondered what it would be like to have a black penis (slang term was actually used). The narrator continued that you would find out in this movie when a black couple moved into next door to a white couple.

Third: A preview of a movie to be shown at a future time at Cinema X theater, entitled "Memories of a Madam." This preview opened with a bed shot of three couples in various states of nudity on the same bed engaged in various oral and genital acts and with one female applying a vibrator to her vaginal area. During subsequent scenes, the narrator's voice was heard saying that you would see what it would be like to be the proper female librarian by day and by night desire to be tied helplessly as a large black stud exposed himself and you begged him to rape you. During this narration, scenes of a white female and black male engaged in copulation in the male superior position were shown. The narration also said that you would see what would happen when an otherwise virile male had to don the female undergarments to obtain tumescence. It showed a male tied to a bed being violently slapped in the face.

Fourth: A preview was presented for a movie entitled, "A Few Bucks More" to be presented at the Cinema X Theater, 716 Monmouth Street, Newport, Kentucky, in which two men were shown on a couch or bed, their erect penises exposed as two women kneeling before them fellatio them, climaxed by both ejaculating in the mouths of the females, the seminal fluid flowing over the females' chins. The narrator's voice was heard urging you to see the dirties sex ever in the future feature.

A fifth preview was shown whose exact title the affiant recalls as "Let Me Count the Lays" for future presentation at the Cinema X theater, 716 Monmouth Street, Newport, Kentucky. The narration of this preview said that it would show you the wedding night of a super-stud husband and his "cherry" virgin wife as she attempted to gain more time by having him detail all his past sexual adventures. During this narration,

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various scenes were shown of the male engaging in cunnilingus, fellatio and copulation with various females.

During the course of affiant's investigation, he also discovered that the film, "Deep Throat" was made in California. He has also discovered that shipments of film addressed to Cinema X theater, 716 Monmouth Street, Newport, Kentucky, have been received through the agency of Greyhound Express for the past several months. He further discovered that a shipment of film was received at the Greyhound Bus Station addressed to Cinema X theater, 716 Monmouth Street, Newport, Kentucky, from Evanstown, Indiana, during the month of January and that the present feature attraction "Deep Throat" began to run at the said Cinema X theater on January 31.

/s/Vernon R. Glossup
Special Agent - FBI
2/26/1973

Sworn to before me, and subscribed in my presence,

/s/Robert Cetrulo
United States Magistrate.

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EXHIBIT NO. 13
(Filed March 3, 1973)

UNITED STATES MAGISTRATE
EASTERN DISTRICT OF KENTUCKY

RECORD OF PROCEEDINGS—MISCELLANEOUS

BEFORE: ROBERT C. CETRULO, Covington, Kentucky

This form should be used to record proceedings for which Forms AO 100 and AO 101 are not adapted, such as applications for search warrants, extradition proceedings, depositions in civil cases, proceedings for the release of poor convicts, references in civil or admiralty cases, attachments and subsequent hearings in internal revenue matters, proceedings to settle or certify nonpayment of seamen's wages, civil rights proceedings, detention of witnesses on proceedings in connection with criminal proceedings, if not included in Form AO 100, etc. A separate page should be used for each proceeding, showing the title of the case, its nature, and the date and nature of each step taken.

Magistrate's Docket No. 3, Case No. 192

United States of America :

vs. :

Stanley Marks, d/b/a Cinema
X Theater, 716 Monmouth
Street, Newport, Kentucky :

**APPLICATION FOR
SEARCH WARRANT**

**2-26-73 —Filing of verified Application for Search Warrant
supported by two Affidavits.**

**2-26-73 —Execution and issuance of Order setting time
and place of adversary hearing for February 27, 1973 at 2:00
P.M.**

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2-26-73 —Legal Research.

2-27-73 —Receipt and review of Briefs of counsel. Oral argument of counsel. Full preliminary hearing on issue of probable cause with respect to issue of alleged obscenity of material sought to be seized.

2-27-73 —Execution of return by Special Agent Paul L. Shannon, FBI, and Lewis Paul Russo, Special Agent, FBI, certifying service of the Order of hearing on February 27, 1973 at 1:20 P.M. EST on Stanley Herman Marks owner of Cinema X Theater, Newport, Kentucky.

2-27-73 — Execution of return by Special Agent Vernon R. Glossup, and certifying service of the Order of hearing on February 26, 1973 on Jay Trimble, cashier, Cinema X Theater, 716 Monmouth Street, Newport, Kentucky on February 26, 1973 at 1:51 P.M. EST.

2-27-73 — Issuance of search warrant.

2-28-73 —Return of executed search warrant made by Special Agent Glossup before Magistrate Cetrulo, with attached two page inventory.

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EXHIBIT NO. 14
(Filed March 1, 1973)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
CONVINGTON

UNITED STATES OF AMERICA	:	Magistrate's Docket No. 3
VS.	:	Case No. 192
STANLEY MARKS	:	
dba Cinema X Theater	:	
716 Monmouth Street	:	SEARCH WARRANT
Newport, Kentucky	:	

To Any Special Agent of the Federal Bureau of Investigation Affidavit having been made before me by Vernon Glossup and Ron Aebly that he is positive that on the premises known as

Cinema X. Theater
716 Monmouth Street
Newport, Kentucky

Campbell County in the Eastern District of Kentucky there is now being concealed certain property, namely

1. One movie film entitled "Deep Throat", a Vanguard film directed by Jerry Gerrard, produced by Lou Perry.
2. One movie film entitled "Carnal Cure" produced by Emilo Portici.
3. One set of previews consisting of clips of movie films variously entitled

which are obscene, lude, lascivious, and filthy and were knowingly transported in interstate commerce for the purpose of

A. 30

sale and distribution in violation of Title 18, Section 1465, United States Code. and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 27th day of February, 1973.

/s/Robert C. Cetrulo.
U.S. Magistrate

RETURN

I received the attached search warrant 2/27/1973, and have executed it as follows:

On 2/27/1973 at 6:28 o'clock P.M., I searched the premises described in the warrant and

I left a copy of the warrant with Jerome Cloud together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

This is to Certify that on February 27, 1973 at Newport, Kentucky, Special Agents of the Federal Bureau of Investigation, U.S. Department of Justice, at the time of conducting a search of the Cinema X Theater, 716 Monmouth Street, Newport, Kentucky, premises, obtained the below listed items. I

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further certify that the below list represents all that was obtained by Special Agents of the Federal Bureau of Investigation, U.S. Department of Justice.

1. Approximately 300 half sheets advertising "Deep Throat".
2. 1 hand printed sign for "Carnal Cure".
3. 4 schedules for times of "Deep Throat", "Swing High", and "Carnal Cure".
4. One shipping carton which contained two reels marked "Swing High" - no film -
5. 1 piece of broken tape inscription "Deep Throat".
6. 2 reels "Deep Throat", "Teenage Cowgirls", "Black on White", "A few Bucks More", "Memoirs of A Madame", "Let me Count the Lays", "Doctors Disciples".
7. 2 reels containing movie "Swing High".;
8. 1 green plastic trash bag containing add of "Deep Throat".
9. 9 advertising posters taken from lobby and approximately 400 half sheets add for "Deep Throat".

This inventory was made in the presence of Jerome Cloud, Attorney Andrew Dennison and Special Agent William S. Dillon.

I swear that his Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/Vernon R. Glossup

Subscribed and sworn to and returned before me this 28th day of February, 1973.

/s/Robert C. Cetrulo
U. S. Magistrate.

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EXHIBIT NO. 15
(Filed March 5, 1973)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

UNITED STATES OF AMERICA,
Plaintiff

Magistrate's Docket No. 3
Case No. 192

vs.

STANLEY MARKS, d.b.a.
CINEMA X THEATRE,
Defendant

NOTICE OF APPEAL

Notice is hereby given that Stanley Marks, defendant herein, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order overruling defendant's Motion to Dismiss, thereby permitting seizure of matter protected by the First Amendment and the imposition of impermissible prior restraint, entered in this action on the 28th day of February, 1973.

/s/ANDREW B. DENNISON
Attorney for Defendant
and
CHARLES J. SCHERER

Certification:

I hereby certify that a copy of the foregoing Notice of Appeal was delivered this 5th day of March, 1973, to the United States Attorney.

/s/ Andrew B. Dennison
Attorney for Defendant

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INDICTMENT
(Filed April 27, 1973)

NO. 11,057

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

THE UNITED STATES OF AMERICA

vs.

STANLEY MARKS DBA CINEMA X THEATRE,
HARRY MOHNEY, GUY WEIR, AMERICAN
AMUSEMENT COMPANY, INC. and AMERICAN
NEWS COMPANY, INC. aka AMERICAN
NEWS DISTRIBUTING COMPANY

INDICTMENT

T. 18, Sec. 1465, USC — Transporting obscene films in interstate commerce for sale or distribution — 8 Cts.
T. 18, Sec. 371, USC — Conspiring to violate Title 18, Sec. 1465, USC — 1 Ct.

A true bill, /s/ James A. Middleton, Foreman.

COUNT 1
(Title 18, Sec. 1465, USC)

THE GRAND JURY CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 24 and January 31, 1973,

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STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film entitled, "Deep Throat" for the purpose of the sale and distribution of said film.

COUNT 2
(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of February 1st and February 27th, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film entitled, "Swing High" for the purpose of the sale and distribution of said film.

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COUNT 3
(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 15 and February 27, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "Doctor's Disciples" for the purpose of the sale and distribution of said film.

COUNT 4
(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 15 and February 27, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other

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states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "Teenage Cowgirls" for the purpose of the sale and distribution of said film.

COUNT 5

(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 15 and February 27, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "Black On White" for the purpose of the sale and distribution of said film.

COUNT 6

(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 15 and February 27, 1973,

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STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "A Few Bucks More," for the purpose of the sale and distribution of said film.

COUNT 7

(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 15 and February 27, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "Memoirs Of A Madam" for the purpose of the sale and distribution of said film.

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COUNT 8
(Title 18, Sec. 1465, USC)

THE GRAND JURY FURTHER CHARGES:

That on or about some date to the Grand Jury unknown, but between the dates of January 15 and February 27, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "Let Me Count The Lays" for the purpose of the sale and distribution of said film.

COUNT 9
(Title 18, Sec. 371, USC)

THE GRAND JURY FURTHER CHARGES:

That beginning on or about August 1, 1970 and continuing to February 27, 1973, in the Eastern District of Kentucky,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

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named as defendants herein, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with diverse other persons to the Grand Jury unknown, to transport and cause to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown to Newport, Campbell County, in the Eastern District of Kentucky, copies of obscene, lewd, lascivious and filthy films, for the purpose of the sale and distribution of said films, in violation of Title 18, Section 1465, United States Code.

It was part of said conspiracy that the defendants,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

would knowingly transport and cause to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of obscene, lewd, lascivious and filthy films entitled, "Deep Throat," "Swing High," film previews entitled, "Doctor's Disciples," "Teenage Cowgirls," "Black on White," "A Few Bucks More," "Memoirs of A Madam," "Let Me Count The Lays" and various other films and film previews to the Grand Jury unknown, for the purpose of the sale and distribution of said films and film previews.

It was further a part of said conspiracy that the defendants and co-conspirators would misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the purposes of and the acts done in furtherances of the conspiracy.

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OVERT ACTS

1. At the times herein after mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about a day to the Grand Jury unknown, but between August 26, 1970 and September 30, 1970, in the Eastern District of Kentucky, the defendants,

**HARRY MOHNEY
STANLEY MARKS
DBA
CINEMA X THEATRE**

caused a telephone, Number 581-9707, to be installed at 716 Monmouth Street, Newport, Kentucky.

2. On or about the 11th day of April 1973, in the Eastern District of Kentucky, the defendants

AMERICAN AMUSEMENT COMPANY, INC.

caused the billing on the phone No. 581-9707 listed in Overt Act 1 above to be changed from

**"Cinema X Theatre
Mohney Enterprises
8250 E. Lansing Rd.
Durand, Michigan 48429**

to **"Cinema X Theatre
c/o American Amusement Company, Inc.
P.O. Box 373
Durand, Michigan 48429**

3. On or about a day unknown to the Grand Jury, in the Eastern District of Kentucky, the defendants,

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**HARRY MOHNEY
STANLEY MARKS
DBA
CINEMA X THEATRE
716 Monmouth Street
Newport, Kentucky**

between the dates of March 1, 1972 and March 31, 1972 caused a telephone, No. 291-9419 to be installed at Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky.

4. On or about the 11th day of April 1973, in the Eastern District of Kentucky, the defendant,

AMERICAN AMUSEMENT COMPANY, INC.

caused the billing of the phone no. 291-9419 listed in Overt Act 3 above to be changed from:

**"Cinema X Theatre
c/o Mohney Enterprises
8250 E. Lansing Rd.
Durand, Michigan 48429**

to: **"Cinema X. Theatre
c/o American Amusement Company, Inc.
P.O. Box 378
Durand, Michigan 48429**

5. That on or about dates to the Grand Jury unknown, but between the dates of August 26, 1970 and February 27, 1973, in the Eastern District of Kentucky, the defendants,

**HARRY MOHNEY
STANLEY MARKS
DBA
CINEMA X THEATRE
716 Monmouth Street
Newport, Kentucky**

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conversed in and inspected the Cinema X Theatre at 716 Monmouth Street, Newport, Kentucky.

6. That on or about dates to the Grand Jury unknown, but between August 26, 1970 and February 27, 1973, in the Eastern District of Kentucky, the defendants,

GUY WEIR
STANLEY MARKS
DBA
CINEMA X THEATRE
716 Monmouth Street
Newport, Kentucky

conversed in and inspected the Cinema X Theatre at 716 Monmouth Street, Newport, Kentucky.

7. That on or about dates to the Grand Jury unknown, but between August 26, 1970 and February 27, 1973, in the Eastern District of Kentucky, the defendant

GUY WEIR

inspected and helped repair projecting equipment at the Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky.

8. That commencing on or about the 26th day of August and continuing until February 27, 1973, in the Eastern District of Kentucky, the defendants,

GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.

booked and supplied obscene films to the Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky, and various other theatres to the Grand Jury unknown.

9. That commencing on or about August 26, 1970

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9. That commencing on or about August 26, 1970 and continuing to February 27, 1973, in the Eastern District of Kentucky, the defendant,

STANLEY MARKS
DBA
CINEMA X THEATRE
716 Monmouth Street
Newport, Kentucky

operated the Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky.

10. That beginning on January 1, 1972 and continuing until December 31, 1972 in the Eastern District of Kentucky, the defendant,

AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

paid the salary of various employees of Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky.

11. That on or about the 16th day of October, 1972, the defendant,

AMERICAN AMUSEMENT COMPANY, INC.

sent a letter to the city of Newport in the Eastern District of Kentucky about the city taxes on employees at Cinema X Theatre, 716 Monmouth Street, Newport, Kentucky.

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12. That on or about the 20th day of January, 1973,
the defendant,

AMERICAN AMUSEMENT COMPANY, INC.

shipped a film by commercial air carrier from Durand, State of
Michigan, to Cinema X Theatre, 716 Monmouth Street, New-
port, in the Eastern District of Kentucky.

A TRUE BILL

/s/James A. Middleton
FOREMAN

EUGENE E. SILER, JR.
UNITED STATES ATTORNEY

By: /s/James E. Arehart
Assistant United States Attorney

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MEMORANDUM
(Filed October 5, 1973)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 11,057

UNITED STATES OF AMERICA

PLAINTIFF

v.

STANLEY MARKS dba Cinema X
Theatre, et al

DEFENDANTS

MEMORANDUM

The court is confronted with eight motions filed by the
defendants: (1) motion by the defendant Marks to dismiss;
(2) motion by Marks for the return and suppression of con-
fiscated property; (3) motion by all defendants (except Marks)
to dismiss; (4) motion by all defendants (except Marks) for
discovery; (5) motion by all defendants for a bill of particulars;
(6) motion by all defendants for inspection of grand jury
minutes; (7) motion by all defendants for production of evi-
dence inconsistent with guilt; (8) motion by Marks to join with
the other defendants in their motions for evidence inconsistent
with guilt; inspection of grand jury minutes; bill of particulars;
discovery; and dismissal.

The Government and other defendants have offered no
objection to Marks' request for consolidation; accordingly, an
order will be entered sustaining that motion.

Motion to Suppress

This motion, filed only on behalf of Marks, seeks the suppression and return of the films generative of this prosecution. The defendant assails the scope and manner of inquiry utilized prior to seizure as well as the First Amendment deprivations allegedly occasioned by the confiscation.

This court is unable to discern any defect in the Magistrate's hearing that would justify the relief sought. Much is made of the failure of the Magistrate to actually view the films in question; instead, he was presented affidavits describing the factual occurrences portrayed on the screen. This method, which was accepted for an initial seizure in *Merritt v. Lewis*, E.D. Cal., 309 F. Supp. 1249, 1253 (1970), satisfies the court that the issuing officer was adequately apprised of the contents of the challenged films, while avoiding needless technicality and insuring a pragmatic approach to the issuance of a warrant. See *Court v. United States*, 6th Cir., 426 F.2d 1354 (1970); *United States v. Kidd*, 6th Cir., 407 F.2d 1316 (1969). The accounts used herein are in no way comparable to the conclusory affidavits condemned in *Marcus v. Search Warrant*, 367 U.S. 717 (1961) and *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968). The procedure employed clearly allowed the Magistrate to "focus searchingly on the question of obscenity", as required by *Marcus*, supra at 732.

The defendant claims that the Government's failure to return the seized materials results in a prior restraint upon the exercise of constitutional guarantees. This issue was resolved against the defendants by order of this court dated April 6, 1973. Further, the accused is mistaken in his argument that *Heller v. New York*, ____ U.S. ____, NO. 71-1043 (June 25, 1973), mandates a return of confiscated material where there is danger of a prior restraint on communicative rights; *Heller* attempted to balance prosecutorial interests against the possible censorial effect of seizing items not yet ruled obscene:

"(O)n a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned." *Id.* at 9.

The record in this case does not reveal either a demonstration by the defendant of the unavailability of copies, or a request for permission to duplicate the movies seized. It is therefore apparent that any First Amendment dilution which occurred through the seizure was the result of the defendants' failure to satisfy the prerequisites outlined in *Heller*.

The claim that the absence of a constitutional standard of obscenity prior to *Miller* rendered the Magistrate's proceedings defective is discussed and rejected in connection with the motion to dismiss; *Miller* forged no new standard, but merely clarified certain ambiguities present in the tests devised earlier.

The defendant's motion to suppress will be overruled.

Motion to Dismiss

The court is not persuaded by the numerous theories for dismissal propounded by the defendants; although it is admittedly difficult to frame cohesive responses to the multitude of propositions forwarded, the arguments may be roughly divided into those attacking the constitutionality of 18 U.S.C. 1465 and those challenging the indictment itself.

The assailed statute proscribes the interstate transportation for sale of the following items:

"any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph

recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than \$5,000 or imprisoned not more than five years, or both." 18 U.S.C. 1465.

It is well understood that obscenity is undeserving of constitutional protection, *Miller v. California*, ____ U.S. ____, NO. 70-73 (June 21, 1973); *Roth v. United States*, 354 U.S. 476 (1957); rather, the defendants' attack relates primarily to definitional terms utilized in the statute. This criticism is unwarranted in view of *Roth v. United States*, supra, and *United States v. Orito*, ____ U.S. ____, NO. 70-69 (June 21, 1973), which rebuked challenges leveled against substantially identical language in 18 U.S.C. 1461 and 1462. See also *United States v. Cote*, 5th Cir., 470 F.2d 755 (1972). A statutory provision will not suffer constitutional invalidation merely because of a lack of complete precision. The fact that certain conduct may fall on either side of legislative terms descriptive of an offense is not fatal so long as an adequate warning of sanctioned activity is conveyed. *Roth v. United States*, supra at 491-492. The Court in *Nash v. United States*, 229 U.S. 373, 377 (1913), recognized that many equivocal acts require a forecast of a jury's subsequent reactions:

"(T)he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment . . . he may incur the penalty of death."

See also *United States v. Wurzbach*, 280 U.S. 396 (1930).

The constitutionality of 18 U.S.C. 1465 is not weakened by the Supreme Court decisions in *Miller v. California*, supra, and accompanying cases. Although these opinions did clarify the earlier disputes surrounding the obscenity question, it

would be simplistic to abandon all earlier attempts in the same direction. The impropriety of such an action is revealed in *United States v. Orito*, supra, affirming the constitutionality of 18 U.S.C. 1462, and *United States v. 12 200 foot reels*, ____ U.S. ____, NO. 70-2 (June 21, 1973), where the Court indicated that any ambiguity in 19 U.S.C. 1305 could be resolved by an interpretation consistent with current judicial reasoning.

It is also argued that since *Miller* formulated a new test of obscenity, prosecution of these defendants for conduct prior to that opinion would invoke the constitutional proscription of ex post facto culpability. This position misapprehends both *Miller* and the Ex Post Facto Clause.

It should initially be noted that the Ex Post Facto Clause is intended to apply to statutory enactments, not judicial construction. *Frank v. Mangum*, 237 U.S. 309 (1915); *United States v. Rundle*, 3d Cir., 383 F.2d 421 (1967), cert. denied 393 U.S. 863 (1968). Although *Bouie v. City of Columbia*, 378 U.S. 347 (1964), did hold that a retroactive application of a court interpretation may offend the Due Process Clause, it is evident that the factors present in the obscenity area render that case easily distinguishable; the *Bouie* holding should be applied only to decisions which are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue . . ." *Id.* at 354. As admitted by the defendant, the previous uncertainty in the realm of obscenity has only been settled by the recent Supreme Court decisions. The *Miller* group did not create a new definition of illegal conduct, but merely clarified earlier concepts of obscenity of which the defendants were constructively aware. *Rosen v. United States*, 161 U.S. 29 (1896); *Nash v. United States*, supra; *United States v. Wurzbach*, supra. Further, the Court's action in remanding *Miller* and its accompanying cases to the lower courts for re-evaluation in light of the clarified standards intimates that the use of the *Miller* standard in the case at bar is entirely proper; prospective application would have been decreed if constitutional violation had been feared.

The defendants cite in support of this argument *United States v. Lang*, C.D. Cal., NO. 10712-HP-CD (June 25, 1973), where a prosecution founded on federal obscenity laws was dismissed in response to the alterations wrought by Miller. This court cannot agree with that decision and notes the four contrary decisions cited by the Government: *United States v. Sians*, 7th Cir., NO. 71-1346 (July 5, 1973); *United States v. Wasserman*, W.D. Tex., NO. A-72-CR-71 (July 25, 1973); *United States v. Pinkus*, C.D. Cal., NO. 11444-DW-CD (July 16, 1973); *United States v. Hill*, S.D. Fla., NO. 73-347 Cr.-NCR.

The attack upon the indictment itself is similarly misplaced. The allegation of invalidity due to the absence of evidence relating to obscenity before the grand jury is without merit. The validity of an indictment is ascertained on its face, not through a probing reappraisal of the evidence before the grand jury; the implementation of such a course would ultimately result in a preliminary trial conducted before the grand jury:

"If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required . . . An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956).

The claim that the nonexistence of evidence relating to scienter warrants dismissal reveals a misunderstanding of the underlying statutory requirements. The federal obscenity provisions do not require a personal belief on the part of the

accused that challenged material is obscene; reliance on *Smith v. California*, 361 U.S. 147 (1959), is misplaced since

"Smith has not been interpreted to require that the defendant know the material to be obscene, but merely know what the material contains, leaving legal rulings to the courts." *United States v. Gundlach*, M.D. Pa., 345 F. Supp. 709, 717 (1972).

The arguments generated by alleged procedural abuses are easily disposed of. First, the defendants attack the government's failure to accord a hearing on the question of obscenity prior to the return of the indictment. Although a hearing is mandated prior to the seizure of materials, *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Cambist Films, Inc. v. Tribell*, E. D. Ky., 293 F. Supp. 407 (1968), there is no requirement for such a process as a condition precedent to the return of an indictment. It further appears that the scope and manner of the hearing satisfied the requirement for an independent judicial evaluation of obscenity. The Magistrate did not view the films in question; however, affidavits describing the factual occurrences portrayed in the movies and prepared by agents who had been exposed to the material were presented to the Magistrate.

The defendants finally claim that the twelve overt acts delineated in the indictment are not sufficient to support a conspiracy charge under 18 U.S.C. 371; the court disagrees. Although the separate actions viewed in an isolated manner reflect a semblance of innocent conduct, a pragmatic examination of these allegations immunizes this charge from dismissal.

Examination of the conspiracy count reveals that it alleges both an unlawful purpose and overt acts manifesting the implementation of a conspiracy. *United States v. Root*, 9th Cir., 366 F.2d 377 (1966), cert. denied 386 U.S. 912 (1967); *United States v. Offutt*, D.C. Cir., 127 F.2d 336 (1942). While the commission of an overt act must be alleged and proven, the act itself does not comprise the offense. *Hudspeth v. McDonald*,

10th Cir., 120 F.2d 962 (1941), cert. denied 314 U.S. 617 (1941). In *United States v. Turner*, E.D. Tenn., 274 F. Supp. 412 (1967), the court was confronted with an allegation similar to that forwarded herein:

"These defendants also move to strike paragraphs 2 and 4 of count 1 on the ground they do not charge the defendants with the commission of unlawful acts. This is not necessary. Many overt acts that are committed in pursuance of the conspiracy may be lawful. Only one overt act whether lawful or unlawful committed in pursuance to a conspiracy is sufficient." *Id.* at 415.

The court is convinced that the defendants were adequately apprised of the charge.

An order will be entered overruling the motion to dismiss.

Motion for Discovery

The defendants seek through this motion any evidence possessed by the Government which might possibly be used in this prosecution, including, but not limited to: (1) memoranda or statements by the defendants or their agents concerning the facts of this action; (2) grand jury testimony; (3) tangible objects taken from the defendants; (4) eavesdropping evidence obtained through electronic means; (5) memoranda or conduct of any person which generated the arrest of these defendants; (6) any records formulated during the past two years pertaining to obscenity investigations by the Government.

An analysis of this motion requires recognition of the different standards of proof which the defendant must satisfy to secure various forms of evidence. Rule 16(a), Federal Rules of Criminal Procedure, provides that the court, upon motion of the defendant, "may" order the production of: (a) written statements by the defendants; (b) reports of physical and

scientific tests and examinations; (c) the defendant's recorded testimony before the grand jury. Although conflict exists as to whether this information is available as a matter of right and without a showing of need, 1 Wright, Federal Practice and Procedure, Section 253, pp. 500-503, notes 33-35, there appears no justification for denying such information in the case at bar. See *United States v. Turner*, E.D. Tenn., 274 F. Supp. 412 (1967).

For the reasons noted in the discussion of the motion to inspect the grand jury minutes, the defense is entitled to inspect any statements or grand jury testimony offered by the defendants on their corporate officers or employees acting in response to subpoenas directed to the corporation, but not evidence relating to the testimony of other persons.

Rule 16(b) allows the defendant access to tangible objects in the possession of the Government only upon a demonstration of materiality and reasonableness. Aside from a bare prefatory allegation that these requirements are present, the defendants claim that production of such material will: (1) protect the defense against illegally seized evidence; (2) provide a fair trial; (3) guarantee proper confrontation with witnesses; (4) enable effective assistance of counsel; (5) insure that all relevant evidence will be brought before the court; (6) either dispense with or shorten the trial. These arguments offer scant improvement over the broad statement offered above, and do not begin to furnish the standard of proof envisioned by the Rule.

"(T)he requirement of Rule 16(b) of a showing of the reasonableness and materiality of the request is not satisfied by a mere conclusory allegation that the requested information is material to the preparation of the defense." *United States v. Conder*, 6th Cir., 423 F.2d 904, 910 (1970).

It is unnecessary to entertain the propriety of the demand for electronically intercepted information since the Government has responded that such methods have not been utilized in this case.

The requests in items five and six are denied. Although current rules envision ready availability of many items upon proper compliance by the defendant, matters identified with the investigatory phase of a case are protected;

"this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses . . . to agents of the government . . ." Rule 16(b), Federal Rules of Criminal Procedure.

It is obvious that a demand for memoranda or conduct of individuals which fostered this prosecution falls squarely within the exclusion above. *United States v. Wilkerson*, 6th Cir., 456 F.2d 57 (1972); *United States v. Turner*, supra. The final request is patently impermissible as a bald attempt to invade the Government's "work product", not only in this case, but in all similar investigations throughout the country. See *Gollaher v. United States*, 9th Cir., 419 F.2d 520, 527-528 (1969), cert. denied 396 U.S. 960 (1969).

Motion for Bill of Particulars

The numerous requests forwarded in this motion can easily be classified into three major areas: (a) the legal theories upon which the Government expects to rely; (b) a detailed narration of the exact manner in which the criminal acts occurred; (c) the names of any witnesses to the commission of this offense; (d) past offenses of the defendants.

The extreme breadth of this motion illustrates an apparent misconception of the purpose of a bill of particulars: It is not a discovery device intended to disengage evidentiary matter, but a discretionary aid designed to

"provide defendant with information about the details of the charge against him if this is necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial . . .

The test in passing on a motion for a bill of particulars should be whether it is necessary that defendant have the particulars sought in order to prepare his defense and in order that prejudicial surprise will be avoided. A defendant should be given enough information about the offense charged so that he may, by the use of diligence, prepare adequately for the trial. If the needed information is in the indictment or information, then no bill of particulars is required." 1 Wright, Federal Practice and Procedure, Section 129, at pp. 283-284.

The defendants' requests for governmental interpretations of obscenity statutes and court decisions are denied. A bill of particulars is not intended to inform the defendant of the prosecution's legal theories or conclusions. Similar demands were refused in *United States v. Luros*, N.D. Iowa, 243 F. Supp. 160, 172 (1965), cert. denied 382 U.S. 956 (1965):

"Paragraphs 1 and 2 of the defendants' motion ask for the definitions of the words 'obscene', 'lewd', 'lascivious', 'indecent', and 'filthy'. The Government is not required to state the definitions of legal terms."

See also *United States v. Bearden*, 5th Cir., 423 F.2d 805 (1970), cert. denied 400 U.S. 836 (1970).

The last two requests must also be denied. Although there may be circumstances in which a list of witnesses should be produced, *Will v. United States*, 289 U.S. 90, 99 (1967), there has been absolutely no indication that this request has a legitimate foundation. See *United States v. Rimanich*, 7th Cir., 422 F.2d 817, 818 (1970); *Hickman v. United States*, 5th Cir., 406

F.2d 414 (1969), cert. denied 394 U.S. 414 (1969). The request for information of defendants' or witnesses' prior criminal records is equally unavailing as this information considerably surpasses the scope of a bill of particulars. *United States v. Johnson*, N.D. Ill., 298 F. Supp. 58, 62 (1969); *United States v. Mavrogiorgis*, S.D.N.Y., 49 F.R.D. 214 (1969).

An order will be entered overruling this motion.

Motion to Inspect Grand Jury Minutes

This motion seeks any recorded grand jury proceedings, including testimony of the individual defendants and officers or employees of the corporate defendants; the movants alternatively seek a summary of the evidence presented if the grand jury sessions were not transcribed.

The availability of grand jury testimony is partially governed by Rule 16(a), Federal Rules of Criminal Procedure:

"Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . (3) recorded testimony of the defendant before a grand jury."

Although this Rule is cast in discretionary terms, the prevailing authority favors permitting the defendant inspection of his own grand jury testimony. *United States v. Turner*, supra; 1 Wright, Federal Practice and Procedure, Section 253, pp. 507-508. Further, this court is included to follow the approach adopted in *United States v. Aeroquip Corporation*, E.D. Mich., 41 F.R.D. 441 (1966), regarding the accessibility of officers' and employees' testimony:

"(T)he court adopts a limited construction of Rule 16(a) (3) to permit at this time, as a matter of right, pretrial disclosure to a corporate defendant only of

the grand jury testimony of corporate officers, who were officers at the time they so testified and of individuals who testified before the grand jury in response to subpoenas *duces tecum* directed to the corporation." *Id.* at 446.

United States v. Louis Carreau, Inc., S.D.N.Y., 42 F.R.D. 408 (1967).

A demand for the grand jury testimony of other witnesses is governed not by the permissive Rule 16(a), but by the more restrictive provisions in Rule 6(e), Federal Rules of Criminal Procedure. Despite the tendency of recent cases to abandon the heavy burden formerly placed upon the movant, see 1 Wright, Federal Practice and Procedure, Section 108, some showing of "particularized need" must still be offered before the production of grand jury testimony will be directed; this court rejects bare allegations that the material is required to adequately prepare for trial or to furnish grounds for dismissal. *United States v. Hensley*, 6th Cir., 374 F.2d 341 (1967), cert. denied 388 U.S. 923 (1967).

Dennis v. United States, 384 U.S. 855 (1966), noted by the defendants, does not propound the expansive posture urged. Although the Supreme Court recognized the potential injustice of the strict rules previously cited to withhold such information, that opinion did not command the dissemination of grand jury evidence merely upon demand.

The alternate request — for particulars if the grand jury testimony was not transcribed — is denied. The specific particulars sought relate not to the defendants' testimony, but to the question of whether evidence of "community standards," "dominant appeal," "prurient interest," and the like were presented. Further, summaries of unrecorded proceedings prepared by government officers are no less confidential than the deliberations themselves. *U.S. Industries, Inc. v. United States District Court*, 9th Cir., 345 F.2d 18 (1965), cert. denied 382 U.S. 814 (1965).

The defendants' allegations are not sufficient to shatter the traditional secrecy accorded grand jury proceedings. An order will be entered sustaining this motion only as to the request for testimony by the defendants or their corporate officers or employees pertaining to the affairs of the defendant corporations.

Motion for Production of Evidence
Favorable to Accused

A motion characterized in this manner must be identified as little more than a "fishing expedition." The courts have agreed that requests incorporating this language are not contemplated by Rule 16, Federal Rules of Criminal Procedure; Wright comments that "general motions seeking discovery of anything in the possession of the government favorable to the defense have received a cold reception from the courts." 1 Wright, Federal Practice and Procedure, Section 254, at page 515. Such a welcome was extended by the Sixth Circuit in *United States v. Moore*, 6th Cir., 439 F.2d 1107, 1108 (1971):

"To grant such a motion would place an almost impossible burden on the Government. The motion is not even limited to evidence in the possession of the Government. The Government would have to determine before the trial whether the evidence is favorable as well as relevant. If this pretrial practice were adopted, there would be little left of our adversary system. It must be remembered that in criminal cases the defendant is not required to disclose anything."

The specific requests proffered by the defendants are discussed above; a favorable ruling on this motion would result in the disgorgement of many materials not made discoverable by even the broadest interpretation of the Criminal Rules.

/s/Mac Swinford, Judge

October 5, 1973

JURY INSTRUCTIONS

(T. 842) (The Court) Now, the defendants did not take the witness stand and as I have stated to you I think the law requires that I given an instruction on that unless it is requested expressly that it not be given and I told you what my instruction would be in general terms.

What do you want to do about that?

(Mr. Dennison) Your Honor, I request that no instruction be given relative to the absence of the Defendant Marks to take the witness stand or to testify in his own behalf, relying upon the general instruction of the Court as to the burden of proof resting upon the government and that there is no duty of proof upon the defendant, without a comment relative to failure to testify.

(The Court) All right.

(Mr. Deitch) We concur, Your Honor.

(Mr. Albert) The corporate (T. 843) defendant American News agrees.

(Mr. Smith) I agree.

(The Court) In other words, you do not want the express instructions that the witnesses did not take the witness stand and that is not considered as any admission of guilt on their part. In other words, you do not want the words "did not take the witness stand" used at all; is that correct?

(Mr. Smith) Yes, sir.

(The Court) Very well. I will make no reference to it at all except in the general proposition that it is the responsibility of the government to prove its case.

(Mr. Smith) Yes, sir.

(The Court) Now, I have one other instruction here which I propose to give and which my study of these instructions offered by the respective sides does not adequately cover.

"You have been instructed on the basis of how a corporation can be held criminally liable on a charge of obscenity as set forth in the indictment; that is, only through its officers and agents under conditions which I have stated. This does not mean that the officers and agents under conditions which I have stated. This does not mean that the officers and agents may be cleared of wrongdoing in the event the corporation (T. 844) "is found guilty. The officers and agents, such as Mr. Weir and Mr. Mohney, may also be held accountable and thereby personally guilty of wrongdoing and if you believe from all the evidence or reasonable inferences that may be drawn from the evidence, to the exclusion of a reasonable doubt, that these defendants, Weir and Mohney, or either of them, knowingly and intentionally, either acting personally or causing another or others to act to effect the transportation of obscene films in interstate commerce from outside the State of Kentucky to this Eastern District of Kentucky for the purpose of sale or distribution, they may be found to be individually and personally guilty as charged in this indictment."

Now, I am going to give that instruction. I will make a correction here. I say "obscene films". I may identify that, make it apply to who is in the proof described, if you believed that they are obscene. In other words, that doesn't mean that some other thing has to be in the evidence in this case.

(Mr. Smith) May it please the Court, this is the first time that we have been exposed to the Court's instructions in this regard and on behalf of Mohney I would merely say to the Court at this (T. 845) point that the Court by the way it read the instruction is suggesting that the Court has found that the

evidence shows that Mohney was an officer or agent of the corporation. I think the Court sort of assumes in its instructions saying to the jury: "If you find that any of the individuals here, individual defendants, acted as officers and agents of the corporation, you may also find them individually guilty."

Does the Court follow my reasoning?

(The Court) I follow your line of reasoning. I do not put that connotation on it. You do object to it.

(Mr. Smith) I will at the proper time. I just wanted to advise you.

(The Court) I wanted to advise you of this before you made your argument, but I propose to give that instruction.

Now, gentlemen, that concludes our pretrial conference for this morning as far as I am concerned. Is there anything else you want to bring up at this time?

(Mr. Smith) Yes, Your Honor, I understand that it is the local practice and tradition for the government to be allowed to go last and not open and close, and we would for the record, since (T. 846) there is some division of authority in various circuits, contend that the government should be required to make a presentation and that it will be unfair to the defendants to have the government have the last word of its last argument, because we can't rebut anything whatsoever; what the government says in its argument when we are deprived of that right and the government can say everything it wants and we can make no response and if the Court proposes to follow that procedure, we will say that it is deprivation of our client's Fifth and Sixth Amendment rights.

(The Court) What do you have to say, Mr. De Falaise?

Do you speak for all defendants?

(Mr. Smith) Yes.

(Mr. DeFalaize) I think the rule has been, whatever division the rule is in other circuits, the rule in this circuit is that the United States puts on its case first but has the last closing argument and I believe at this point in time to vary this rule would be a serious deprivation of the outstanding rights of the United States.

(Mr. Smith) Well, I just heard about this rule this morning and I didn't have a chance (T. 847) to do research.

(The Court) That is the common law rule. The practice in Kentucky and in states generally under the old conformity rules of state practice ignored that rule. I am inclined to think that the objection is well taken. That doesn't mean that you have to give a full and complete argument of the case, but you do have to make a fair statement of your case. I am not putting you on terms as to time, but that means that you are to make a fair statement of what you rely on for a conviction and you may save the bulk of your arguments until your final argument, but I might also advise you that if you make an opening statement then the defense has a right to decline to put on any argument and that's it, you can't come back.

(Mr. Smith) If the Court please, will the Court be giving us a brief period of time to look at what the Court has ruled on before we have to argue?

(The Court) Yes.

(Mr. Smith) Thank you.

(The Court) I am going to take a recess now in light of my statement here.

(Reporter's note: The Court recessed for ten minutes. (T. 848) At the conclusion of the recess the defendants were

present with their counsel, the United States was represented by counsel, the jury resumed its place in the box. Opening argument was made in behalf of the government by Mr. DeFalaize. Closing arguments were made in behalf of the respective defendants by their counsel. Closing argument was then made by Mr. DeFalaize in behalf of the government.)

(The Court) Members of the jury, in order that you might be fully advised of our situation here, it is now a quarter of five. It will be necessary for me to instruct you tonight. It may take a little time to do it. I will make it as rapid as I can without overlooking anything, I hope. This is an involved case and one which requires some considerable rules of law to be given to you. I don't want to make it confusing to you and I assure you that I won't make it confusing to you. I don't want you to get the impression that this is so involved and so many technical terms used here that you are not qualified to decide the case, because that is not true. You are qualified to decide the case. This is a jury case. I don't know of a better type case for a conscientious jury to consider than this one. Before I conclude I will make the issue which you will have (T. 849) to decide very sharp. You will have no trouble in recognizing it, you will have no difficulty in applying the rules of evidence to the evidence, as I shall give them to you, and I am confident that you can arrive at a fair and a just verdict.

I am going to instruct you this evening, so tomorrow morning at 9:00 o'clock I can submit the case to you without any additional delay and you will have full opportunity to consider all of the evidence in the case, the whole case, without being under any pressure of time.

Now, in the first place I want to get back on the track a little bit. We have heard about five hours of argument, all of which I am sure was enlightening and helpful, but I do want to remind you that you are not to decide whether you like this law or don't like it. It is the law of the land. Considerable argument was made along the line that a person should be

able to do what he wanted to do, so long as he wasn't interfering with anybody else. Now, whether he is interfering with anybody else is a factual situation which we must consider as having been considered by the Congress and its committees before this law was enacted. This is the law of the land and I am going to read it to you. So (T. 850) you are not to treat it lightly on the assumption that, "what harm is it doing anybody so long as they don't pay to go see these pictures?" I don't know and I am not going to undertake to even suggest what the reason for the Congress were in enacting this statute. It is a statute which has been on the books, adopted by members of both houses of Congress, signed by the president of the United States at the time it was enacted and it is the law of the land. So we are not to concern ourselves with the fact that this is in violation of the First Amendment because it is not a violation of the First Amendment. I state that to you categorically and it is treated as a constitutional law so long as it is on the statute books and until the courts of the land declare it unconstitutional and it has been declared constitutional. So we start with that, not with any idea of belittling the law. This is a solemn enactment of Congress and you as jurors are sworn to uphold it.

Now, in order that there might not be any misunderstanding, this is not a state law in this case. There is a similar state law, or maybe a similar state law or one involving the same thing, but this is a law of the United States and it simply says that: "any obscene, lewd, lascivious, or filthy (T. 851) book, pamphlet, picture, film, paper, letter, writing, print, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character" shall not be transported in interstate commerce.

That is the law, that is what you are going to try this case on, to determine from this evidence in the light of the instructions which I will give you and all reasonable inferences may be drawn from the evidence whether or not these

defendants or any of them have violated that law within the meaning of the law and under the terms which I shall give you, meaning that their guilt must be established to your satisfaction.

You will probably hear this more than once throughout this instruction, "must be established to the exclusion of a reasonable doubt", as that term will be defined to you.

I make this statement at the outset of these instructions in order that we might not confuse ourselves with whether we like the law or dislike the law. I think I questioned you about that at the outset and it was indicated by me that you were not to consult your own personal feelings, but that you were to accept the law and determine whether (T. 852) or not it had been violated under the evidence.

Now, members of the jury, these defendants and each of them are presumed to be innocent until their guilt is established to your satisfaction to the exclusion of a reasonable doubt. That presumption of innocence starts with them, and each of them, at the outset of the trial and continues with them throughout the trial and if on the whole case you have a reasonable doubt of their having been proven guilty, then you should find those defendants or that defendant to whom you entertain such reasonable doubt not guilty.

The term "reasonable doubt" may be considered as I shall read it to you from this statement which I give here as a statement of law.

The defendants on trial in this case must be proven guilty by evidence offered by the United States, which has the burden of proof to establish the alleged guilt of the Defendants on trial in this case and the burden the Government assumes in the beginning and carries throughout to the end, until it has met it by showing to you the guilt of the Defendant, beyond a reasonable doubt. The Defendants,

having entered pleas of not guilty, are deemed to be innocent. This presumption of (T. 853) innocence attends and protects the Defendants throughout the trial, until it has been met and overcome by evidence produced by the Government which shows and establishes the Defendants' guilt, beyond a reasonable doubt.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors do not feel convinced that a defendant is guilty of the charge. A defendant cannot be convicted upon mere suspicion, conjecture or speculation on the part of the jury.

In the present case, the burden of proof is upon the Government to establish every part of its case, beyond a reasonable doubt, and if any part of it, you are left in doubt, the Defendants or any one of them are entitled to the benefit of doubt and must be found not guilty or acquitted.

In other words, a reasonable doubt is best defined by a use of the term itself. A reasonable doubt is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation, but a doubt for which there is reason, such doubt as might guide you in determining the more important or every day affairs of your own (T. 854) existence. The United States is required to prove its case beyond a reasonable doubt; it is not required to prove its case beyond all doubt. Few things are capable of proof to absolute certainty and if it were required that the United States should remove all doubt from the minds of each of twelve jurors before a conviction could be had, it would be practically impossible to enforce the criminal laws. And while the defendant is protected, as I say, by the laws which requires the United States to prove its case beyond a reasonable doubt, it is not an irrational doubt, it is not an unreasonable doubt, but a doubt for which there is reason. If you have such a doubt, then you should find the defendant or the defendants, or that defendant as to whom

you entertain such doubts not guilty. If you do not have such a doubt, it is your duty to find them guilty.

A unanimous verdict is required. You will elect one of your number foreman and the foreman will sign the verdict for the jury. You cannot arrive at your verdict by holding a primary election or taking a majority or any other percentage of the jurors, but it must be the verdict of each juror. Our system of justice presumes that twelve (T. 855) disinterested citizens of a given community or district, who know nothing about the case that they are called upon to try, never heard of it, know nothing of the defendants or have no particular interest in protecting or offending any of the accused, that twelve citizens can sit together under identical circumstances and hear witnesses testify, have the whole atmosphere of the trial in the case, hear the respective arguments, on the respective sides and the instructions given by the Court, and by discussing that together, the evidence and the facts of the case together, can arrive at a fair and a just decision.

Consequently, it is presumed that intelligent and disinterested citizens who sit upon a jury will approach the determination of a very serious problem. This is a serious case, it is serious for the defendants, it is serious for the United States, not to be taken lightly, and when you go to your jury room you are instructed that you should give due regard to the reasoning, recollection, arguments, discussion of your fellow jurors.

I have never sat on a jury but I have known people who have and I have been told (T. 856) that at times you go to the jury room and some one or more of the jurors will immediately announce what the verdict should be and they will stay there all day or all night, or some other extravagant statement, mistaking I am afraid hard-headedness and stubbornness for strong-mindedness. So when I say that the verdict is to be unanimous, that means that it should be the verdict of each juror but you should not reach a quick decision or take an arbitrary or uncompromising stand until

you have given the case full consideration in the light of the discussion among your fellow jurors.

You have to realize, of course, that it is important to decide this case. The United States Attorney has discharged his duty, the defense counsel has discharged their duties, the regular attaches of the Court have gone about and discharged their functions here. I am giving you the instructions of the law and it will be your duty if you can conscientiously do so under the law to decide the case. I do not mean to suggest that you should forego your own convictions in any sense, although you may be the only juror that sees the case as you see it and you have a duty to adhere to that conviction if it is arrived at after (T. 857) consideration, as I have outlined those steps, even though your fellow jurors may not agree with you. However, you are to also realize that there are twelve people on the jury and the system anticipates that twelve people, as I say, can possibly with some resilience on the part of all of them, make a conclusion of the case.

The indictment in this case is composed of nine separate counts. A count in an indictment is a separate charge. In other words, this could have been nine different indictments. Instead of that it was brought in one indictment, in nine different counts or charges. And so you will treat each count separately as it applies to each defendant. I will give you a form of verdict here which will make it an acceptable method whereby you may express yourself. You are not going to have to do an awful lot of writing or anything of that kind, but you are to treat each defendant separately, determine his guilt or his guilt on each count of the indictment separately.

The indictment itself is not of any evidential value; it is merely the charge. The United States is put upon the responsibility of proving all of the allegations in this indictment. (T. 858) The defense is not required to offer proof of anything. The responsibility rests upon the United States after a plea of not guilty, which has been entered in this case, to each count of this indictment, by each of the defendants, thereby categorically denying the charges set forth

in the indictment. You are not to say or assume that because there is an indictment that that of itself is some evidence of guilt; it is not and is not to be so treated.

Now, the matter of penalty in the federal courts is different from the state court. Possibly some of you have served on juries in state court. In the criminal trial in state court the jury determines the guilt or innocence of the accused and if the defendant is found guilty, if they find that the defendant is guilty, make that as their verdict; then they have the further responsibility of fixing the penalty. Now, in the federal courts that is not the law. Your responsibility stops when you determine the guilt or innocence of each of these defendants as it pertains to each count in the indictment. The matter of penalty addresses itself entirely to the trial judge, who in the light of his knowledge, experience, various methods by which he qualifies (T. 859) for that function, fixes the penalty. And so when you have decided the defendant is not guilty, if you do decide that as to any of them, then that concludes that case as to that defendant. If you decide that any or all of the defendants are guilty, then you have concluded your work as a juror and the matter of penalty addresses itself to the trial judge.

In the federal court it is the privilege and some time the duty of the trial judge to comment on the evidence. I do not propose to do that to any great extent, at least, but if I should you are not to accept what I may say as all of the evidence in the case. I certainly will not presume to review all of the evidence in this case of these past two weeks. You are not to accept what I may say as all of the important evidence or all of the important evidence on a given point. You may not accept what I will say, if I do refer to the evidence, as necessarily true. I would not intentionally make a misstatement, but you are the triers of the facts and it will be for you to determine what the evidence is and what reasonable inferences may be drawn from it.

The law considers two types of (T. 860) evidence, direct evidence and circumstantial evidence. In this case the essential facts to be established to your satisfaction to the exclusion of a reasonable doubt start out with the proposition that this was an interstate transaction. That is what makes it a federal case, that is, it is charged in this indictment that these defendants either did this themselves or caused it to be done, to transport these films in interstate commerce from some place outside of the Eastern District of Kentucky and outside of Kentucky into the State of Kentucky and into this District. Now, naturally, as I think it has been referred to here, the United States cannot produce — at least it hasn't produced — and it would be impossible, I assume, for it to produce a witness who actually saw these films being brought across the river from Ohio or any place else into Kentucky. And so, of course, if someone was seen carrying this film, with the name of the film "Deep Throat" and these other names on it, carrying it across the river, that would be direct evidence.

And so, the United States not having that kind of witness must rely on what is known as circumstantial evidence. Circumstantial (T. 861) evidence may be just as strong as direct evidence if you believe from the surrounding facts and circumstances that it establishes the fact. So you are advised that direct evidence is where a witness testifies to what he saw, heard or observed, what he knows of his own knowledge, something which comes to him by virtue of his senses.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind. Stated somewhat differently, circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

Circumstantial evidence, if believed, is of no less value than direct evidence for in either case you must be convinced beyond a reasonable doubt of the guilt of the defendant or defendants.

That is about all there is to circumstantial evidence. You infer, on the basis (T. 862) of reason and experience, from an established fact, the existence of some further fact. There are times when different inferences may be drawn from the facts. Whether they are proved by direct or circumstantial evidence, the government asks you to draw one set of inferences, while the defendant asks you to draw another. It is for you to decide, and for you alone, what inferences will be drawn.

Now, in the law one who aids or assists another in the commission of an offense is equally guilty with the principals. So you are instructed this statute applies in this case and it is a proper instruction to give to you:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"Whoever willfully causes an act to be done which is directly performed by him or another would be an offense against the United States, is punishable as a principal."

It is not necessary for the (T. 863) Government to show that each defendant physically committed the crime himself. Section 2 of Title 18, United States Code, provides that a person who aids and abets another to commit an offense is just as guilty of that offense, as if he committed it himself. Accordingly, you may find beyond a reasonable doubt that one defendant committed the offense and that the other defendant aided and abetted him.

To determine whether a defendant aided and abetted the commission of an offense, you ask yourselves these questions:

Did he associate himself with the venture? Did he participate in it as something he wished to bring about? Did he seek by his action to make it succeed? If he did, then he is an aider and abettor.

Now, this ninth count in the indictment charges a conspiracy. The law provides as follows, and I will read it to you:

"If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each is guilty of an offense against the United States."

(T. 864) Now, I know "conspiracy", the term sounds legalistic, but it is very simple. It is an everyday term. We all generally know what a conspiracy is, a combination of more than one person, two or more people, combined to carry out a given purpose, a very terse definition of conspiracy in the law is: a conspiracy is an agreement between two or more persons to commit an unlawful act or to commit a lawful act in an unlawful way.

Now, the conspiracy charged in this indictment is that these defendants, all four of them, or all five of them, the individuals and the corporate defendants, entered into a conspiracy. That does not mean that the United States has to show that they sat down around the table and drew up a formal document or by discussing said, "We will all form a conspiracy and we will do this, that and the other to effect a violation of this statute by transferring from one state into this District in Kentucky a film which is made unlawful by law." That would be the perfect conspiracy if you had some eye witness to prove that that was done. Naturally that is a little extreme. And so the United States (T. 865) must rely on numerous, or how many you may think they have established here, facts and circumstances to show that these five defendants had a meeting of the minds, even though they

may never have gotten together and actually formed the conspiracy as such; but if you believe that throughout this period of time as named in the indictment they arrived at a common understanding for this film to be sent from the corporate defendants and the personal defendants in Michigan to this district in Kentucky, to Cinema X Theatre, or to Mr. Marks, and that he was to show it and that they were to thereby to receive remuneration for it, whatever it may be, much or little, and if you believe that there are sufficient facts and circumstances to show that they had a meeting of the minds and that some one act or more acts, but at least one, was done by any member of the conspiracy to carry out its objects and purposes and was done during the life of the conspiracy, then that completes the charge.

Now, I don't want to compound or rather obscure what might be a rather obscure situation and I will give you an illustration. Let us assume that three people would agree among (T. 866) themselves to rob a bank. That doesn't mean that they all had to sit down, as I say, and draw up a formal instrument that they were going to do it, but they had a common understanding and that one was to get an automobile and one was to make a plan of get away, and so forth. If nothing was ever done, if they just had that meeting of the minds and that was the end of it, no act was ever done to carry out the object and purpose of the conspiracy, then no one is guilty of anything. But if one was supposed to go and get an automobile and he went and got an automobile, even though the bank was never robbed, the conspiracy has been formed and there was an unlawful act committed by all three of those defendants.

What the United States says here is that these defendants had this agreement and they carried it out by sending this film into this district and that each of them had some particular function. They name in this indictment, they set out what are called overt acts or acts which are alleged to have been committed by the conspirators, either individually or collectively, and at this point I do want to call your

attention to Overt Act No. 7. I did this before, but I will do it again so you won't (T. 867) overlook it, which is not to be considered by the jury. Leave out that overt act. It has not been established and it is not to be considered. I mean there is no evidence. I am not saying that any of them have been established, but I am saying that there has been no evidence and the Court ruled as a matter of law that an Overt Act No. 7, which states:

"That on or about some date to the Grand Jury unknown, but between the dates of January 15, and February 27, 1973,

STANLEY MARKS DBA CINEMA X THEATRE
HARRY MOHNEY
GUY WEIR
AMERICAN AMUSEMENT COMPANY, INC.
AMERICAN NEWS COMPANY, INC. AKA
AMERICAN NEWS DISTRIBUTING COMPANY

knowingly transported and caused to be transported in interstate commerce from the states of Michigan, Indiana and other states to the Grand Jury unknown, to Newport, Campbell County, in the Eastern District of Kentucky, copies of an obscene, lewd, lascivious and filthy film preview entitled, "Memoirs Of A Madam" for the purpose of the sale and distribution of said film."

(T. 868) Now, that was never established, there was no evidence on that point, so you are not to consider that overt act. You may consider all of the other overt acts set out in the indictment under this conspiracy Count 9.

Four essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment:

First: That the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged;

Second: That the accused willfully became a member of the conspiracy;

Third: That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and

Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

If the jury should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved, and that during the (T. 869) existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete; and it is complete as to every person found by the jury to have been willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Now, one other thing I do want to point out to you here. I made the statement to you during the progress of the trial, but I will state it to you again. Any statement made by a member of a conspiracy, even though in the absence of his co-defendant, or co-conspirators, may be considered as

evidence against all of them if it is made during the life of the conspiracy and in furtherance of its object and purposes. Otherwise, until you believe the conspiracy has been formed, (T. 870) you must put that test to it: Was there a conspiracy? If you decide that there was then you have a right to consider the statement that was made by any one of the alleged conspirators, even though his co-conspirators may not have been present at the time.

Possibly, by way of review — this is a little repetitious, but I don't want to overlook the proper instruction, so I will give it to you again.

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of "partnership in criminal purposes", in which each member becomes the agent of every other member. The gist of the offense, is a combination or agreement to disobey, or to disregard, the law.

Mere similarity of conduct among various persons, and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

(T. 871) However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, slated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy; nor that all means or methods, which were agreed upon, were actually used or put into operation; nor that all of the persons charged to have been members of the alleged conspiracy were such. What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be (T. 872) used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the indictment; and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy, as charged in the indictment.

In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused willfully become a member of the conspiracy.

In other words, if you should determine that the conspiracy existed, as I stated a few minutes ago, you should then determine whether or not each one, each member, taking up each alleged defendant, each alleged member, each of the defendants, you are to determine whether that particular defendant was actually a part of it.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully (T. 873) formed and that the (a) defendant willfully became a member of the conspiracy either at its inception or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then there may be a conviction even

though the conspirators may not have succeeded in accomplishing their common object or purpose and in fact may have failed to do so.

The extent of any defendant's participation, moreover, is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he may have played only a minor part in the conspiracy.

An "overt act" is any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and (T. 874) must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

If from all the evidence and the reasonable inferences therefrom, you believe beyond a reasonable doubt that two or more of the individuals or corporations charged in Count 9 of the indictment in this case, did in fact conspire to violate a law of the United States, then I charge you that all those so found may be convicted of any substantive offense in Counts 1 thru 8 of this indictment, committed by any one of them, pursuant to the conspiracy set out in Count 9, if you believe beyond a reasonable doubt, from all the evidence, that any one of them did any of the substantive crimes charged in Counts 1 thru 8 pursuant to the conspiracy.

Now, members of the jury, we have had in this case numerous witnesses, some of whom have been offered to you as expert witnesses and you are instructed that witnesses are to be weighed and not counted. Weight does not depend upon having the greater number of witnesses. You may believe one witness against many. The jury determines the weight to be given (T. 875) the testimony of the witnesses by their

demeanor on the stand, their interest in the case, the facts bearing on their credibility, their intelligence and knowledge, their prejudice and interest, if any, and not by their number.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses". Witnesses who, by education and experience, have become expert in some area, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

Now, some of the defendants in this (T. 876) case, two of the defendants, are corporations. A corporation is a legal entity, or person, and a corporation may be found guilty of a criminal offense. A corporation is a creature of statute; it is not an individual, but it is only operated and controlled by humans, by individuals. A corporation itself is a separate entity. So, consequently, a corporation may violate the law, as an individual, but it must do it through its authorized agents and officers and directors.

A corporation of course may only act through natural persons, who are known as its agents. In general, any agent or representative of a corporation possessing adequate authority may bind the corporation by his acts, declarations and omissions. In order to find a corporation defendant guilty, you must find that all of the essential elements of the offense, as set out in these instructions, are present as to the

corporation within their authority. The scope of authority of these agents is a question of fact for you to decide just as other fact questions in the case.

Just as in the case of an individual defendant, the burden is on the Government to establish the guilt of a corporate defendant beyond (T. 877) reasonable doubt.

As a general rule, whatever any person is legally capable of doing himself can be done through another as agent. So, if the acts of an employee or other agent are voluntarily and intentionally ordered or directed, or authorized or consented to by the accused, then the law holds the accused responsible for such acts, the same as if the acts had in fact been done by the accused.

A stockholder or director of a corporation may not be held criminally liable for specific acts of his corporation, performed through its employees, unless he actually and personally performed the act which constitutes the offense or the act was done at his direction or with his permission. Consequently, the Defendant, Harry Mohny, as a stockholder or director of the Defendant corporation, may not be found guilty of the offenses alleged unless the Government has proved beyond a reasonable doubt that the publication charged as being obscene, was transported or caused to be transported in Interstate Commerce at the direction of the stockholder or director.

(T. 878) In other words, a person can't be held accountable for something that the corporation does if it is unknown to him, although he is responsible for the conduct of the business of the corporation. He naturally does not do all of these things himself. Corporations act through agents and if he knew it was being done, if it was done with his approval and assent and acquiescence, it is considered to be by his direction since he was in charge of what the corporation did or had a part in its acts and he may be, if you believe that he acquiesced, with his knowledge and

consent and acquiescence and approval, and you believe that fact, as I say, to the exclusion of a reasonable doubt, then he may be found guilty for the corporation.

You have been instructed on the basis of how a corporation can be held criminally liable on a charge of obscenity as set forth in the indictment; that is, only through its officers and agents under conditions which I have stated. This does not mean that the officers and agents may be cleared of wrongdoing in the event the corporation is found guilty. The officers and agents, such as Mr. Weir and Mr. Mohny, may also be held (T. 879) accountable and thereby personally guilty of wrongdoing and if you believe from all the evidence or reasonable inferences that may be drawn from the evidence, to the exclusion of a reasonable doubt, that these defendants, Weir and Mohny, or either of them, knowingly and intentionally, either acting personally or causing another or others to act to effect the transportation of obscene films in interstate commerce from outside the State of Kentucky to this Eastern District of Kentucky for the purpose of sale or distribution, they may be found to be individually and personally guilty as charged in this indictment, treating them not collectively and not together, but each one of them and applying the rules of law as I have given them to you, to each of them.

You will note that the indictment charges the defendants with knowingly transporting or causing to be transported in interstate commerce certain obscene films for sale of distribution and that these were transported from Michigan, Ohio, and other states. You are instructed that the statute involved, 18, U.S.C. 1465, prohibits transporting such obscene films in (T. 880) interstate commerce for sale or distribution. Thus, it is not necessary that the United States prove that the films were shipped from both Michigan and Ohio and some other state into Kentucky, so long as it is proven that the films were shipped from another state into Kentucky and that the defendants or any of them caused them to be transported into Kentucky from one of those other states.

In other words, even though you may believe that they were sent by the defendants or some of them, even though they came in a round about way, it doesn't mean that they came necessarily direct but were sent from out of this district, out of state into this district, into Kentucky. I don't think you will have any difficulty about sale or distribution. That doesn't mean that they have to be pedaled out. The sale of the film is accomplished if it is shown and money is taken from patrons to see it. That is a sale and distribution of the film. It doesn't mean that they have to go around and distribute it among people, but the sale and distribution is achieved if they put it into commerce by showing it at the theater, if you believe that they did that for (T. 881) money, or not necessarily for money, but that is the charge in the statute, for sale or distribution.

The term "interstate commerce" includes commerce between one state and another state. I think you understand that.

If you find that the motion picture film "Deep Throat" was transported between some other state and Kentucky on the occasions alleged in the Indictment, then I charge you that the interstate commerce element of those Counts has been satisfied.

By transportation of the film for the purpose of sale or distribution is meant transportation for commercial gain or exhibition to others as opposed to a purely private viewing by the transporter.

If you believe from all the evidence that the movie, "Deep Throat" or any other of the films in the indictment were made in a state outside of Kentucky and were then found in possession of a theater or person in this state, you may draw the inference if you so believe that any such film has been transported in interstate commerce.

The essential elements required (T. 882) to be proved beyond a reasonable doubt in order to establish the offenses charged in the indictment are as follows:

1. That on or about the dates set forth in the indictment in Counts 1 thru 8, the defendants transported or caused to be transported in interstate commerce from some state outside of Kentucky into Kentucky an obscene film for the purpose of sale and distribution.

2. The defendants had knowledge of the nature or character of the contents of the film at the time it was transported in interstate commerce and knowledge of the interstate character of the shipment.

3. The defendants knowingly transported or caused to be transported in interstate commerce an obscene film for the purpose of sale and distribution.

4. The average person, applying contemporary community standards, would find that the film, taken as a whole, appeals to one's prurient interest in sex.

5. That the film depicts or describes, in a patently offensive way, sexual conduct, including but not limited to ultimate (T. 883) sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, and lewd exhibition of the genitals.

6. That the film, taken as a whole, lacks serious literary, artistic, political, or scientific value.

These last three elements constitute the judicially determined definition of obscenity.

Counts 1 thru 9 of the indictment includes the words of the statute, namely the adjectives "obscene", "lewd", and "lascivious", but the gist of the offenses alleged in those counts are that the Defendants knowingly and willfully caused

to be transported an obscene film in interstate commerce for purpose of sale or distribution.

The best of whether the film is obscene is as follows: Whether to the average person, applying contemporary community standards, the film taken as a whole appeals to the prurient interest.

Under this definition, three elements must exist: (1) whether the average person, applying contemporary community (T. 884) standards would find that the film, taken as a whole, appeals to the prurient interest in sex; (2) whether the film depicts or describes, in a patently offensive way, sexual conduct, including but not limited to ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, and the lewd exhibition of the genitals, and (3) whether the film, taken as a whole, lacks serious literary, artistic, political or scientific value.

The first test to be applied in determining whether the film charged herein is obscene is whether the average person, applying contemporary community standards would find that the film, taken as a whole, appeals to one's prurient interest in sex.

A "prurient interest" is an inordinate, shameful, morbid, degrading, unhealthy and unwholesome interest in sex and in details concerning sex. A film which appeals or panders to an interest in sex that can be described by those adjectives appeals to prurient interest. This does not mean that a film can be said to appeal to prurient interest merely because it describes an activity of which you disapprove. It is not the (T. 885) matter that the film describes, but the manner in which it describes it, that determines whether it is to be condemned. If the film is calculated, by the physical actions that it describes and depicts and the detail and manner and such description and depiction, to appeal to and excite in the viewer shameful, morbid, degrading unhealthy or unwholesome interests, thoughts or desires, you can find that

it appeals to prurient interest. This judgment must of course be made in light of contemporary community standards as applied by the average person with an average and normal attitude toward an interest in sex. If you conclude that the detail and manner of description goes beyond that which the average person would consider a normal interest in sex and appeals instead to an inordinate, shameful, morbid, degrading, unhealthy and unwholesome interest, and that to the average person the degree of this appeal offends community standards, and if you arrive at this conclusion beyond a reasonable doubt, you should find that the film appeals to prurient interest and is obscene.

The "average person" is, of course, a hypothetical person. The phrase means (T. 886) a person with an average interest and attitude toward sex: not a libertine, not a prude, not a person who is preoccupied with sex, not a person who rarely if ever thinks about sex, not a person who thinks sex is the most important thing to be discussed. The phrase means a normal individual of average sex instincts; not one who is oversexed, not one who is under-sexed, not one who thinks sex is the most important factor in life, and not one who is afraid of sex or repelled by sex or ignorant of sex or bored by sex. The phrase means, in short, a normal, healthy, average adult man or woman with normal, healthy, average attitudes, instincts and interests toward sex.

The Court has charged you that one ingredient of "obscenity" is the appeal of the press materials to prurient interest. "Prurient" is a word that may mean different things to different people. Under the law herein, a prurient interest is only a shameful or morbid interest in sex, nudity or excretion. Press materials do not appeal to a prurient interest if the average viewer today can view the publication candidly, openly and with the normal interest in (T. 887) sex which all persons presumably have in greater or lesser degree.

The explicit depiction of sex or sexual activity is not synonymous with obscenity. You may find such explicit

depictions ugly or repulsive and it would still be your duty to find them not obscene if they do not meet the legal test of obscenity that I have given to you.

The second test to be applied in determining whether the film is obscene, is whether it depicts or describes, in a patently offensive way, sexual conduct, including but not limited to ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions and lewd exhibition of the genitals.

In applying this test, you must consider the film as a whole and not part by part. You must measure the film by contemporary or current local community standards and determine whether the film so exceeds the limits of candor in the description or representation of sex, so as to be patently offensive. In other words, if you find the film patently offensive because it affronts contemporary community standards relating to the (T. 888) description or representation of sex, then, if you find the other elements of these crimes to exist, you may find Defendants guilty.

"Contemporary community standards" means the standards generally held throughout the Eastern District of Kentucky. We are not measuring this term "contemporary community standards" directly with what happened in Newport or on Monmouth Street, but it includes the whole Eastern District of Kentucky. You people on the jury are from different parts. Some of you are from Newport, Campbell County, maybe Monmouth Street, I don't know; others of you from out in Boone County, some in Bracken, some in Mason. This District extends to sixty-seven counties in Kentucky, goes throughout the whole eastern district of Kentucky, as I explained that to you when you qualified as jurors. So you are not to say, "Well, a thing like that wouldn't offend a person or even be obscene maybe under some conditions, but on the other hand, there are things we know to some people more prudish that even something of less significance then might be drawn from these films would

be considered obscene. So I think you pretty generally under (T. 889) stand, but I don't want you to say, "Well, that doesn't offend anybody where they had this theater," or, "They wouldn't have to do to see it." That is not the point. The point is whether or not it is of such a nature that you believe in light of these instructions which I have given you, in light of the evidence, that this film is obscene because it offends contemporary community standards, contemporary community standards being the neighborhood of the Eastern District of Kentucky concerning sex, judged by the average person in this community as I have defined it to you. The phrase means, as it has been aptly stated, "the average conscience of the time" and "the present critical point in the compromise between candor and shame at which the community may have arrived here and now." You, the jury, are the sole judges of the contemporary community standards of the Eastern District of Kentucky. Although you may consider expert testimony on the subject of community standards, if offered by either side, expert testimony is not necessary. You may give such expert testimony whatever weight you think it deserves or disregard it entirely. The determination rests with you — not (T. 890) with any expert. In arriving at and applying your judgment, however, you are not to consider your own standards of what is good and bad. You are not to condemn by your own standards, if you know and believe them to be stricter than those generally held, and you are not to exculpate or excuse by your own standards, if you know and believe them to be more tolerant than those that are generally held.

That business of an "average person" is necessarily vague and I am not sure if there is such a person who might be considered average in the Eastern District of Kentucky, or any other community in our country or in the world. That must necessarily be a very vague term, but it is the best that the law can provide and it does have a significance of meaning which all of us generally, I think, understand, not an

extremist in either sense, in any way, but a person who might be representative of this district.

If you find that the films in this Indictment exceed substantially the limits of candor in the description or representation of sex which is acceptable in the Eastern District of (T. 891) Kentucky, then you may find the film to be patently offensive.

In determining contemporary standards, you should take into account such things as dress styles, which include hot pants and see-through blouses; topless and bottomless bars; adult theaters which exhibit films dealing candidly with sex matters; adult book stores which sell publications containing pictorial and verbal portrayals dealing with sex; adult motion picture theaters which display films containing explicit, sexual conduct.

(T. 892) Your own personal and social views on the press materials charged as obscene in the indictment may not be considered. Thus, whether you believe that the press materials are good or bad is of no concern; so too, you may not consider whether in your opinion the press materials are moral or immoral; whether they are likely to be helpful or injurious to the public morals. Similarly, whether you like or dislike the press materials, whether they offend or shock you, may not be considered by you. You may think the press materials are immoral, shocking or offensive, and you must acquit the defendants if the press materials are not obscene, as the Court has defined that term for you.

The third test to be applied is whether the film lacks serious literary, artistic, political, or scientific value. Now, if you believe that this film lacks serious literary, artistic, political or scientific value, or whether it does have those adjectives, serious literary, artistic, political or scientific value it is not obscene, but if it lacks those, that is the exception that is taken out of this. You can determine if those

adjectives as I have read them to you are (T. 893) to these films; then it is not obscene within the meaning of the law.

Obscenity is excluded from constitutional protection because it is without serious social importance. Obscene utterances are no essential part of an exposition of ideas and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Of course, the mere fact that a film deals with sex does not mean that it cannot have value to society. Indeed, such a film can have social importance if it portrays sex in a manner that advocates ideas or that has literary, scientific, political or artistic value. It is for you to determine whether the film in issue in this case is of such value to society. If you find that it lacks serious literary, artistic, political, or scientific value, you can brand it obscene. If you find that it does have those, one or more of those adjectives that I have given you, then you should determine that it is not obscene.

"The film when taken as a whole" means that you are to view each film in its entirety. You are to judge the film as a whole (T. 894) on the basis of its total effect and not on the basis of isolated passages or sequences. Thus, the film is not to be condemned merely because it contains passages or sequences that are descriptive of sexual activity, nor is it to be exculpated or excused despite containing such descriptive passages or sequences merely because it has a plot, tells a story, purports to point out a moral or deliver a message, or contains passages or sequences that are descriptive of other than sexual activity. You are to weigh the total effect of the film and determine what is its main thrust. You must decide whether the sexually descriptive content of the film outweighs, or is subordinate to, all other content. You must determine whether the descriptions or depictions of sexual activity merely illuminate and support the story told or the message delivered by the film or whether the message; story and other incidents of the film are merely accessory to and

provide a format or setting for the descriptions or depictions or sexual activity.

You are instructed as a matter of law that it is not necessary for the Government to prove that the films in the indictment were (T. 895) exhibited to juveniles or unwilling adults before you can find it obscene.

All that is necessary for you to find the film obscene is: that the average person applying contemporary community standards of the Eastern District of Kentucky would find that the film, taken as a whole, appeals to the prurient interest in sex; that the film depicts or describes in a patently offensive way sexual conduct; and that the film, taken as a whole, lacks serious literary, artistic, political or scientific value.

The First Amendment to the Constitution of the United States guarantees freedom of speech and press. It is a basic guarantee of the First Amendment that one is free to advocate ideas. With respect to the nature of ideas, they may be of the widest variety, including the unorthodox, the controversial, or even ideas hateful to the prevailing climate of opinion, but unless they are integrated with unlawful conduct, such ideas have the full protection of the guarantees of the First Amendment.

The guaranty of the Constitution is not confined to the expression of ideas that are conventional or shared by a majority.

(T. 896) Liberty of circulation is as essential to freedom of the press as liberty of publication; indeed, without the circulation, the publication would be of little value. This circulation of press materials would be protected by the First Amendment to the same extent as the printing and publication thereof.

You are instructed that it is entirely irrelevant that a Defendant may have intended to make a profit from the

transportation of the press materials involved in this case. That fact is immaterial as is the fact that daily metropolitan newspapers, films and books are sold or exhibited for a profit in our free enterprise system.

No media of communication including publications such as are involved in this case, may be deemed obscene merely because they are distributed or sold commercially.

The Government must prove beyond a reasonable doubt that the Defendants acted with knowledge before there may be a conviction. This is to insure that no defendant will be convicted because of innocent mistake, accident or inadvertence, the requirement of (T. 897) knowledge applies both to the placing of the film in interstate commerce and to the contents of the film.

It is not necessary for the Government to prove that the Defendants, had actual knowledge concerning, or actually directed the specific shipment named in the indictment. It is sufficient to show that the Defendants knew their business was carried on between states and that they participated in the operation of the business.

In considering whether or not the Defendants, had knowledge of the contents of the packages, you may consider all pertinent evidence in the case. You may consider all of the circumstances in the case, and all inferences reasonably drawn from the evidence to determine whether or not the Defendants, acted with knowledge.

You must be satisfied beyond a reasonable doubt that the Defendants, were in some manner aware of the character or nature of the film alleged to be transported in interstate commerce. The belief of the Defendants, as to the obscenity of the film is irrelevant. If you find — you are the ones that are going to determine (T. 898) its obscenity, so they cannot say, "I shipped it but I didn't know it was obscene." That is

not a defense. If they knew they were shipping it or knew it was being shipped, if it is determined that it is obscene that identifies the guilt of the accused in violating this statute. If you find that the Defendants knew what they were doing, their personal belief that they were not violating the law is no defense.

The Indictment charges a serious crime which requires proof of specific intent before a defendant can be convicted. "Specific intent", as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove, beyond a reasonable doubt, that a defendant knowingly did an act which the law forbids.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a defendant's intent from the surrounding circumstances. You may consider any statement made, or acts done or omitted by a defendant, and all other facts and circumstances in evidence which indicates his state (T. 899) of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

It is your duty to give separate consideration to the charges against each corporate defendant and against each individual defendant. You may find all of the defendants guilty, or all of the defendants not guilty, or some guilty and some not guilty, all as the facts found by you warrant.

The verdict must represent the considered judgment of each juror. It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each juror must decide the case for himself or herself. A juror is not required to surrender honest convictions as to the weight, effect, or lack of evidence solely because of the opinion of a fellow juror, or for the mere purpose of returning a verdict.

A jury which is conscientiously unable to agree on a verdict is just as much a safeguard for liberty and justice as one which has (T. 900) reached a verdict. A juror is never required to sacrifice his or her conscientious scruples for the sake of reaching agreement.

You will note the indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Now, members of the jury, I feel in a sense I should apologize to you for giving you these extended instructions, but as I stated at the outset there are cases, of which this is one, in which it is necessary to state definite rules of law to guide the jury in arriving at its verdict. It is not what might be termed a simple case, although the thing you are to decide is easy of recognition and in the light of all the evidence you are personally competent and qualified to reach a verdict one way or the other. It is the theory of the Defendants in this case that they were merely acting, showed the film and these films which you have seen here — now, that is the test, (T. 901) after all, in light of all these instructions — you saw these films and you are to decide in this case what those films are in light of those instructions, whether or not you believe they are obscene. It is the theory of the defense that they are not obscene, and that under the statutes these films are not filthy films, are not lewd or lascivious or obscene, that they have value as I have outlined that to you, that they have literary, artistic, political or scientific value and that they are not of such a nature that they can do anybody any harm or that they can harm the community and that they are without the contemplation of the Congress in enacting this statute. That is the position of the Defendants, that they are innocent of wrong-doing.

In the first place, they say that the interstate nature has not been proven, the evidence that has been offered in that regard was inconsequential and that the United States has not established that it was an interstate transaction. If you believe that it was not an interstate transaction, that ends the case. You have to find that it was interstate. The Defendants say they haven't proved that to the exclusion of a reasonable (T. 902) doubt. The Defendants say, as I say, that these films are not obscene and they do not offend the average person with contemporary community taste, or that they are not offensive to such a person; and that therefore they have done no harm, that they have had no part in doing wrong and that they should be found not guilty.

The United States, on the other hand, says that by the very showing of these films, they show a lack of literary, artistic, political or scientific value of any kind, that they are pure filth and that they are the kind of thing that this statute was passed to keep from being shown in the community. The law makes a distinction by saying that apparently from decisions of the court things that might be shown in one community could not be shown in another community. In other words, a visit to a contemporary community, as I say the Eastern District of Kentucky, and more or less leaves it up to the juries, those charged with making such a decision, as to whether or not it violates social ideas of that community taken in the terms that I have outlined it to you, the average person. So you are to decide very simply, you saw the films, you know (T. 903) what they are, not judging them particularly by your own standards, but are they of such a nature that you believe that they offend, as charged in the statute, are obscene to the average person in this Eastern District of Kentucky. If you believe that they do and you believe that the interstate transaction has been established, the United States contends that the evidence clearly establishes that fact to the exclusion of a reasonable doubt and that the Defendants are guilty and that you are to find them guilty. If you do not so believe, you should find them not guilty.

As I say, you may find one of them guilty, the others not guilty, some of them guilty on one count, some of them not guilty, all of them guilty or all of them not guilty. The conspiracy count stands alone. I have given you the definition of that. I think you understand that, a common understanding — I won't go through that again — a meeting of the minds to do these acts and to produce this film in this District from outside the state for the purpose of publication and sale.

Now, members of the jury, I don't believe in complimenting people for doing (T. 904) their duty and so I never go on that theme. I don't like to do a lot of talking from the bench. I am more or less a disciple of Francis Bacon, who said that "An over-speaking judge is no well-tuned cymbal." I have done a lot of talking this afternoon and I feel like I should apologize. You have been very patient and have been throughout this extended trial and it has been extended. It started last Tuesday, I believe, at 10:00 o'clock and has been going ever since with half a day out. As I say, I don't mean to flatter you but I have noticed the close attention which you have given to this whole case and you are to be commended for it.

I am confident that you can, taking this evidence to your room, these exhibits — you don't have to do a minute examination, a thorough audit of all these exhibits — you should look at them and see what they are and identify them in the light of the whole evidence. That doesn't mean that you have to act as a certified public accountant undertaking to make a complex layout. They are there for your examination and you can study them as much as you please for that matter. I don't mean that you shouldn't, you (T. 905) should. Take these exhibits tomorrow in light of the whole evidence, go to your room and see if you can make a verdict in this case.

I'm going to excuse you until 9:00 o'clock tomorrow morning. I will submit the case to you as shortly as I can

thereafter. I want you to go to your jury room. Come to the side door.

Mr. Marshal, keep the courtroom locked and they can go to their jury room until they are called down.

I want to emphasize that you observe all admonitions strictly and I am confident that you will do that. That is especially true about talking to members of your family, which is natural, and most anyone does and you have to guard yourself more in that respect than any other single aspect of the admonition. Don't read anything or listen to any newscast. Just dismiss it from your minds and get a good night's rest and start tomorrow trying to remember. You will get some help from your fellow jurors, so don't get to wondering this. Just wait until tomorrow when you come back and take it up.

One other thing, and that is I (T. 906) want you to stay in a good humor. You know, you get to a certain stage in any long, drawn-out affair, whatever it may be, where your nerves get a little frayed and it is a real test of character, one that doesn't let that overcome them. You know, good-humor is one of the marks of intelligence. It is not the only mark. There are a lot of ill-tempered people who are very intelligent, but it is a mark of intelligence and I am sure that you will observe that. You will all be good friends after this is over. You may form an association and have a reunion. I have seen jurors do that. But bear these things in mind and go and come back tomorrow morning.

You may adjourn court until 9:00 o'clock, after the jury has retired. (Reporter's note: The jurors retired from the courtroom.)

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"The Judgments and Opinions of the United States Court of Appeals for the Sixth Circuit are not included herein since they are set forth in the Appendix to the Petition for Writ of Certiorari."